A COMMENTARY

ON

THE BILLS OF EXCHANGE ACT

CHAPTER 119 OF THE REVISED STATUTES
OF CANADA, 1906

WITH REFERENCES TO ENGLISH, CANADIAN AND AMERICAN CASES, AND THE OPINIONS OF EMINENT JURISTS

BY

THE HONOURABLE BENJAMIN RUSSELL
M. A., D. C. L.

Judge of the Supreme Court of Nova Scotia

Professor of Contracts, and Lecturer on Bills and Notes, Sales and Equity Jurisprudence in the Law Faculty of Dalhousie University, Halifax, Nova Scotia

HALIFAX:
McALPINE PUBLISHING COMPANY, LIMITED
1909

PREFACE.

The volume now presented to the profession is the outcome of a series of letters addressed to the public through the Toronto *Mail* about twenty years ago. The Bills of Exchange act had not then been passed and, so far as the author was then aware, had not been thought of. The purpose of the letters was to call attention to the necessity for a statute providing a general law in relation to negotiable instruments to be applicable to the whole Dominion. During the course of the correspondence a statement was made through the press that the matter had been under the consideration of the Dominion authorities, and that a bill was in course of preparation to be introduced during the approaching session of parliament, but no bill was introduced and the desired legislation was not passed until the session of 1890. The writer was at that time lecturing on the subect of Bills and Notes to the students of Dalhousie Law School, and has been engaged in that task from year to year ever since that date. The lectures are now in the form of comments upon the act of Parliament, and in this form they are here presented to the public. No reader of this book will ever be more conscious of its imperfections than is the writer, who confidently expects that errors will be discovered,—perhaps many errors,—that have thus far escaped his notice. But the book would never be published at all if the author were to withhold its publication until he was assured that the work was perfect.

The letters referred to are here given substantially in the form in which they appeared in the Toronto *Mail*, omitting a few references called for by the correspondence to which they gave rise. *Post hoc proper hoc* is not always a safe inference. The fact, however, remains that the letters were written before the Bills of Exchange act was passed, that they were the first reference in any organ of public opinion in Canada to the necessity or utility of such an enactment, and that within about a twelvemonth from their publication a bill was laid before the House of Commons which carried into effect the views expressed by the writer.

The following is the correspondence addressed to the Toronto *Mail*:

SIR,—I should like to call the attention of your mercantile readers to the necessity of some legislation by the Dominion parliament for the improvement of our commercial law. It must be pretty generally known that when the act of union was passed it was thought possible that, as one of the natural consequences of the step then taken, there might in course of time be brought about an assimilation of the laws of the various provinces respecting property and civil rights, and of the methods of procedure in our various provincial courts. That this idea was cherished by the fathers of confederation is manifested in the clearest possible way in the 94th section of the British North America act, which enables the parliament of Canada, under certain limitations and conditions, to make provision for the uniformity in these respects of the laws of the three English-speaking provinces of the confederation. After twenty years of union we are apparently as far off as ever from realizing this ideal, but it was hoped by some of us that the consolidation and revision of the statutes of Canada would present a favorable opportunity for some steps, however timid and halting, in this direction.

If there is one subject coming within the legislative authority of the Dominion parliament deeply affecting the interests of the mercantile community as to which, more than any other, a perfect uniformity of legal principles and procedure throughout the Dominion is desirable, it is the subject dealt with in chapter 123 of the revised statutes, entitled "An act respecting bills of exchange and promissory notes." These instruments, as it will occur to everyone upon a moment's reflection, are of such world-wide necessity for the purposes of commercial intercourse, and they travel with such facility and frequency from country to country, creating rights and liabilities of such multiplicity and variety in the course of successive negotiations, that it is exceedingly desirable to have the law with reference to them codified under international sanctions, so that the principles and modes of procedure as far as possible should be uniform throughout the whole community of nations. To a very considerable extent this law is already uniform throughout the commercial world. As it was long ago finely said by Mr. Justice Story in the supreme court of the United States, "the law respecting negotiable instruments may be truly declared in the language of Cicero,

adopted by Lord Mansfield, to be in a great measure not the law of a single country only but of the commercial world; *non erit alia lex Romae, alia Athenis, alia nunc, alia posthac; sed et apud omnes gentes et omni tempore, una eademque lex obtinebit.*" These stately periods of the great American juri.: are after all nothing more than the plainest commo. sense, and they suggest as an obvious reflection the :mense convenience that it would be to the commercial world, which knows, or ought to know no international boundaries, if the rights and liabilities created by the making and negotiation of such instruments could be made substantially similar among all civilised nations. If this be true, how infinitely absurd must it be to have half a dozen different laws prevailing in a community of a few millions of people!

Let it be granted that exceptional legislation is required for—or demanded by, rather than required for—the province of Quebec; what possible necessity can there be for the luxuriant variety of statutory provisions by which the subject is regulated in the various English-speaking provinces of the Dominion? In the compass of this short act, consisting of only thirty sections, we have special provisions applicable only to the province of New Brunswick, others that apply only to Prince Edward Island, and no less than ten sections, constituting about one-third of the whole chapter, that apply exclusively to the province of Ontario, besides the standing exception of the province of Quebec that we are always obliged to reckon with at every turn. It would almost seem that upon this subject the Dominion parliament had abdicated its function of making laws for the "peace, order and good government of Canada," and had simply contented itself with putting upon the statute-book, for all time, a sort of crazy-quilt, made up of all kinds of irregular and shapeless excerpts from the statute books of the various provinces. A foreigner reading our statute for the first time would naturally conclude that there must be something peculiar in the genius of the peoples of the several provinces, or in their methods of business to which these peculiarities in the statute would be found to correspond; but, except as to the province of Quebec, his conjecture would be utterly beside the mark.

A single illustration taken at random will serve to show the way in which our statute has grown up and the purely fortuitous character of the peculiarities to which

I have inferred. A controversy arose in the early part of this century between the King's Bench and Common Pleas—one of the kind of controversies of which our legal history is full—in reference to the effect of the acceptance of a bill of exchange by which it was made payable at a particular place. It is unnecessary for our present purpose to mention the precise points at issue; suffice it to say that the matter was at length brought up to the House of Lords, where the opinions of the twelve judges were taken upon a series of questions propounded for their consideration. Nothing could better illustrate the glorious uncertainty of our system of law, or, as its admirers would perhaps prefer to say, its marvellous elasticity, than the great variety of answers that were returned by the judges, and the narrow majorities by which the points finally determined upon were carried. The House of Lords gave its deliverance after hearing the answer of the judges, but, as the statement of the law thus arrived at was not satisfactory to the mercantile community, an act was passed, known to lawyers as Sergeant Onslow's act, which provided in effect that a qualified acceptance should not be a qualified acceptance unless the drawee went out of his way to say so in express terms. Now this statute was, as it happens, adopted in Prince Edward Island and in Ontario. In Ontario the principle that it established was extended to the making of a promissory note, as well as to the acceptance of a bill of exchange. It did not happen to be adopted in either Nova Scotia or New Brunswick, and it would naturally be supposed, from the solemnity with which the distinction has been perpetuated by our Dominion revisors, that the omission of this provision from our provincial statute book must have been the result of deliberate policy. How far this may be true of New Brunswick I am unable to say; but to anyone who knows the way in which things come about in the legislation of this province the suggestion of a deliberate policy to adopt a different principle from that prevailing in the old country on such a subject as this would be simply amusing. Everyone knows that the only reason why the statute was not adopted here was that it was nobody's business in particular to see that it was adopted.

But even if this were not the real solution of the matter, and even assuming that the difference between the law of this province and of New Brunswick on the one hand and that of Prince Edward Island and Ontario on

the other was the result of deliberate policy on the part of our legislatures, and not of mere accident, the merits of the case are not altered in the least. It is the obvious duty of our Dominion legislators to make up their minds which of these two sets of statutes is the best, and whichever is the one preferred, to apply it to all parts of the Dominion alike. If an acceptance payable at a particular place should, in the absence of negative words or words of exclusion, be a general acceptance in Ontario and Prince Edward Island, surely there is no reason why the same principle should not prevail in New Brunswick and Nova Scotia. If the principle is wisely extended by statute to the making of promissory notes in the province of Ontario there is no reason why it should not be so extended in Prince Edward Island, and in every other province of the Dominion; and if the principle were ever so good in itself it would be better to do without it altogether than to create confusion by adopting it in one or two provinces, and not applying it to every other province of the Dominion.

The illustration that I have given is only one of a number that might be presented to show that the act referred to, instead of being, as it should have been and ought now to be made, a carefully drafted statute, combining the best features of all the various provincial laws, and making them applicable to the Dominion at large, is simply a patch-work of a number of provincial statutes, taken up in all the various stages of their accidental development, and strung together, accurately enough as a mere statement of the existing laws of the various provinces, but without any effort to fuse them into a consistent and serviceable piece of legislation. Perhaps this was the best that the revisors could do for us under the instructions upon which they did their work, but it is to be regretted that they were not at liberty to take a wider view of their commission and prepare a draft act of the character suggested, which, with the proper explanations, could hardly have failed to commend itself to the approval of parliament.

I trust it has been made sufficiently clear that upon this subject, which is one of vital interest to the mercantile community, there is ample room for improvement in our legislation, even if we should aim no higher than the production of an act providing for uniformity in the statutory modifications of the common law applicable to the subject.

At the risk of wearying some of your non-professional readers with mere matters of detail, I should

like to adduce another illustration from the multitude that might be cited to show how completely the condition of our statutory, no less than of our judiciary law, is at the mercy of accident. By referring to page 1660 of the draft of the Revised Statutes submitted to Parliament in 1885, it will be found that in section 4 of the Act respecting Bills of Exchange and Promissory Notes it was proposed to enact that "no acceptance of any bill of exchange shall be sufficient to bind or charge any person, unless such acceptance is in writing on the bill, or if there is more than one part of such bill; then on one of the said parts." The commissioners add a note to this clause explaining that "in New Brunswick and Prince Edward Island this provision is restricted to inland bills." Now, it would occur to anyone who was interested in this subject to enquire how it had happened that in Ontario and Nova Scotia the provision referred to was of general character, while in New Brunswick and Prince Edward Island it was restricted to bills of a particular class. Was this difference accidental or designed? Such a question as this can only be answered by tracing the history of the legislation upon this subject. To any student of legal history the enquiry will prove an interesting one, and it will serve to show, not only how imperfect have been the methods of legislation in the Mother Country, but also in how thoroughly hap-hazard a manner that legislation has been adopted and applied in the colonies.

Before the well known statute of Anne by which promissory notes were put on the same footing with respect to their negotiable quality as bills of exchange, and "the law of Westminster Hall"—to use the peevish expression of Lord Holt—was made conformable to "the law of Lombard Street," considerable discussion had taken place in the courts of the Old Country as to what was necessary to constitute a valid acceptance of a bill of exchange. By that statute it was enacted, among other things, that from and after a date mentioned in the Act, "no acceptance of any inland bill of exchange shall be sufficient to charge any person whatsoever, unless the same be underwritten or indorsed in writing thereupon, etc." To the untutored mind of any ordinary layman—to the mind of anyone reading this language with no other thought than that of gathering its natural and obvious meaning, it would seem to be clearly apparent that the intention of the Legislature was to do away with merely oral acceptances altogether;

and it might have been anticipated, whatever was the condition of things before the passing of this Act, that thenceforward the courts and the mercantile community would be no longer bewildered with subtle and refined distinctions as to virtual acceptances, constructive acceptances, and merely oral promises and undertakings to accept. Here was a plain and positive enactment providing that henceforward, as to inland bills, at all events, no acceptance should amount to anything at all unless it was in writing upon the bill. *Sancta simplicitas!* I suppose it would puzzle the wit of man to contrive a form of words that would be understood by the courts in exactly the same sense in which it was intended by the Legislature; and unfortunately this statute was not, after all, framed in the most felicitous terms. After enacting, as already stated, it added a proviso that nothing therein contained should extend to discharge any remedy that any person might have against the drawer, acceptor or indorser of the bill. This proviso, taken together with some further expressions in the enacting clause that were read with perverse ingenuity, as limitations of its meaning, practically nullified the enactment, and let in the very mischief that the statute was intended to remedy. Under the peculiar ruling of the Court of King's Bench, differing as it so often did from the Court of Common Pleas, the same old question cropped up as before; and the courts went on defining, limiting and distinguishing, as they had always done, not without a strong protest from Lord Kenyon, among others, until at length another effort was made by 1 and 2 George II, to say, what there is every reason in the nature of things, as well as the high authority of Lord Wensleydale, for supposing, that they had endeavoured to say long before by the statute of Anne. They again enacted in 1821, substantially as they had done before, that no acceptance of any inland bill of exchange should be sufficient to charge any person, unless such acceptance was in writing upon such bill, or on one of its parts. By a subsequent enactment passed in 1856, the provisions of the earlier statute were extended to bills of every kind; and it was enacted that, after a date mentioned in the statute, no acceptance of any bill of exchange, whether inland or foreign, should be sufficient to bind or charge any person, unless the same was in writing on such bill or one of its parts, and signed by the acceptor or some other person duly authorized by him.

We are now in a position to account for the difference between the law of New Brunswick and Prince Edward Island on the one hand, and that of Ontario and Nova Scotia on the other, and to answer the question whether it was accidental or designed. Who can doubt that it was the result of mere inadvertence and neglect? Whether the New Brunswick and Island legislators were the first to discover the fact that Imperial legislation had taken place on the subject it would impossible to say without a minute examination of the statutes. If they were the earlier discoverers, certainly the Ontario and Nova Scotia lawyers were the most successful. It would seem that, having discovered and adopted the statute of 1821, the New Brunswick and Island legislators fell into a profound sleep; while in Ontario and Nova Scotia our parliamentary lawyers kept their eyes open to what was going on in the Old Country and eventually succeeded in discovering the wider, and at the same time more exacting enactment of 1856. I suspect that this is the real reason and the only reason for the difference between the statutes of New Brunswick and Prince Edward Island on the one hand, and those of Ontario and this province on the other. The supposition that the New Brunswick and Prince Edward Island lawyers deliberately and with full knowledge of the state of the law in the Old Country, determined that it was better to preserve, as to this matter, the distinction between inland and foreign bills is an extremely improbable one. In the case of New Brunswick it is rendered all the more improbable by the fact that the Supreme Court of that Province, in dealing with a case reported in 5, Allen's Reports, not only ignored, as they were bound to do, the statute of 1856, which had not been re-enacted there, but ignored as well the statute of 1821, which, I suppose, must have been re-enacted long before, and decided the cause before them on the authority of cases determined in England in 1803, which could not have possessed any authority whatever upon this point after the statute of 1821. So true is it, as to our legislative as well as our judicial work, that being a new and poor country we must put up with its being "cheaply and roughly done."

The anomaly to which reference has been made and the cause of which has been explained, I hope not at too tedious length, has been corrected in the Act as finally passed; and the law requiring the acceptance to be in writing on the bill and signed by the acceptor has been

applied to inland and foreign bills alike in all parts of the Dominion. This is, of course, as it should be. In so far the revisors have done well; but the question returns, why was not the same policy adopted with respect to all other anomalies brought to light by the revision of the statutes? Why is it, for example, that section 7 is confined in terms to the Province of Nova Scotia and immediately afterwards repeated in section 8, in a more general form, as applicable exclusively to Prince Edward Island? And why is a special provision as to the same subject, differing from both of the sections last mentioned, made applicable by section 10 exclusively to the Province of New Brunswick? The revisors have taken the liberty of extending to the whole Dominion the provisions of section 11, originally applicable to the former province of Canada only; why could they not have been equally bold in either adopting or discarding as to the whole Dominion the provisions of Sergeant Onslow's Act as to qualified acceptances? What reason is there in the nature of things why the provisions of section 7 as to the position of a *bona fide* holder for value of a bill given upon usurious considerations should be applicable exclusively to the Province of Ontario? Why should there be an express enactment that in Ontario no bill of exchange shall be presented for acceptance on a non-juridical day, while the lawyers in other provinces are allowed as to this point to guide themselves by the flickering and uncertain light of the common law? Why enact the elaborate provisions of the 19th and 20th sections as to the assessment of damages and the ascertainment of the rate of exchange for the Province of Ontario alone, and leave us in all the other provinces to the tender mercies of judiciary law? These questions might be multiplied to any number. They are suggested by the most cursory reading of the statute. They prove that, as I have already pointed out, the chapter instead of being, as it should have been, and should now be made, a congruous and orderly statute, embodying the best features of all the various provincial enactments that enter into its composition, is obviously a mere paste-and-scissors performance, calling for no skill beyond that of a scrivener, and wholly unworthy of a place in the Revised Statutes of Canada.

It is bad enough to be obliged to read, in a work which should contain all the public statutory law of the Dominion, that "the articles of the Civil Code of Lower Canada relating to this subject will be found in the col-

lection of statutes not consolidated. It might have been hoped that in dealing with such a subject as this,—the law with reference to which is to so considerable an extent founded upon the Civil law, and presents such striking peculiarities that can only be accounted for by the fact that the doctrines and principles of the civil law have considerably influenced its development,—even the Quebec lawyers would have been willing to lay aside their prejudices and co-operate with those of the other provinces in framing a statute for the whole Dominion. Their laws, their language and their institutions would not have suffered the slightest detriment had they joined in such an effort. But what can be expected from Quebec, when even Ontario and Nova Scotia lawyers view with such apparent complacency this hodge-podge of little provincial crotchets and whimsies that has been put upon the statute book of the country for the regulation of one of the most important matters coming within the legislative authority of the Dominion Parliament!

It will be in the knowledge of many of your readers that the whole subject of bills of exchange and promissory notes has been dealt with in a comprehensive manner by the Imperial Parliament in an Act bearing what must have seemed to many English lawyers the somewhat startling title of "An Act to Codify the Law Relating to Bills of Exchange, Cheques and Promissory Notes." The history of this Act is, of course, perfectly familiar to the very able and accomplished lawyer who presides over the Department of Justice; but it is not clear that the lesson of that history has been as deeply pondered by him as it might have been. The Act was not prepared in a few months by a clerk of one of the Houses of Parliament. It was the production of a specialist who had given many years of study to the subject, and who was the author of a text book of authority, which has just recently gone to its third edition. The writer referred to—his Honour Judge Chalmers—tells us about the matter in an article in the *Law Quarterly Review* for February, 1886, entitled, "An Experiment in Codification." *Law Quarterly Review*, Vol. II, p. 125. The Act is founded in the main on Chalmers' digest of the law of bills and notes, many, if not most, of the sections of the statute being a mere transcript, *ipssissimis verbis*, of the corresponding articles of the digest. This digest had been before the public for a number of years, used as a text

book by law students, as a convenient hand-book for merchants and bankers, and as a *vade mecum* of legal practitioners until its principles and modes of statement had become familiar to every specialist on the subject to which it referred. Its propositions were so clear and its illustrations for the most part so apt and lucid, that the very existence of such a work and its demonstrated practical utility suggested the obvious advantage that would result to the business community from giving to those propositions, with or without the illustrations that accompanied them, the authority and sanction of an Act of Parliament. Similar attempts had been made before with Sir James Stephen's digest of the criminal law, and Mr. Frederick Pollock's codification of the law of partnership, but both of these attempts had been unsuccessful, owing to causes which are fully explained in the article from which I am quoting. The Bills of Exchange Act had a better fate, and with the skilful management of Sir Farrer Herschell in the House of Commons and the powerful advocacy of Lord Bramwell in the House of Lords, it eventually became an Act of Parliament. By this act the law contained in about twenty-five hundred cases and a number of statutory enactments is crystallized into a chapter of a hundred sections, which can be understood from the beginning to the end by any intelligent layman. It would be folly to say that it has put an end to all doubt and litigation on the subject to which it relates. No reasonable advocate of codification would ever put forward such a claim for the best enactment that wit of mortal could contrive. Judge Chalmers' claim for it is a much more modest one, and his claim, as he limits it, must in all fairness be conceded. Writing, in 1886, he says, "The Act has now been in operation for more than three years, so that some estimate can be formed as to its results. Merchants and bankers say that it is a great convenience to them to have the whole of the general principles of the law of bills, notes, and cheques contained in a single Act of 100 sections. As regards particular cases which arise, it is very seldom necessary to go beyond the Act itself. It surely must be a great advantage to foreigners who have English bill transactions to have an authoritative statement of the English law on the subject in an accessible form. If I could do the work over again, I certainly could do it better and should profit by past experience. But, as it is, the Act has given rise to little or no litigation. Its construction has twice been

adverted to in reported cases, and there is one direct decision upon it, but in that case it was admitted that the Act correctly reproduced the common law."

To anyone who has experienced the difficulty of learning what is the common law, even upon matters that would seem beforehand to be of the greatest simplicity, a statute which correctly reproduces it in clear and unambiguous terms will be admitted to be a simply inestimable boon. The statute referred to not only confers this boon upon English lawyers, but it presents clear and intelligible rules as to quite a number of points upon which, before its enactment, it was impossible to say what was the common law, either because the authorities were conflicting or because there were no authorities at all. In several particulars the rules adopted by the courts have been altered by the statute, and wherever this has occurred it must be conceded that the law has been changed for the better. Generally speaking, such changes as have been made were introduced upon the suggestion of the Select Committee of merchants, bankers and lawyers to which the bill was referred in the course of its passage through Parliament. To particularize under any of these heads would be needless for professional readers and wearisome to all others. If nothing better can be done it would certainly be no bad thing to simply enact this statute as it stands, with only such changes as are rendered absolutely necessary by the peculiarities of our situation. A few of the clauses would possibly give rise to some nice questions as to the legislative authority of the Dominion Parliament to pass them. Some of them relate to questions of procedure upon which provincial Legislatures have heretofore assumed, rightly or wrongly, that they had exclusive authority. One of the clauses of the Act is precisely identical with provisions contained in the Revised Statutes of Nova Scotia, enacted since the Union without any question occurring to anybody as to its validity. Other provisions would probably present questions of greater nicety and difficulty.

An illustration of the difficulty of drawing the line that separates Dominion from provincial legislative authority has already been presented in connection with this very subject. An old enactment of the Legislature of this province imparted certain of the qualities of a promissory note to instruments by which a sum certain was promised to be paid otherwise than in money. As it occurred in a chapter of the Revised Statutes relating to

promissory notes, it was naturally assumed to be *ultra vires* of the Legislature of Nova Scotia, and was by the commissioners who revised our stautues in 1874 placed in an appendix of unrepealed legislation upon subjects over which it was either doubtful whether our Legislature had jurisdiction or certain that it had not. The commissioners who revised the statutes of the province in 1885 settled the matter to their own satisfaction by determining that the subject of the enactment was within the exclusive competency of the Dominion Parliament and omitted it from their revision of the statutes altogether, relying upon the Dominion Parliament to repeal it. The Dominion revisers, on the other hand, declined to have anything to do with it beyond mentioning it in their schedule as an enactment within the powers of the Provincial Legislature. Who shall decide when doctors disagree? If the Dominion authorities are right, it would seem that the statute has been unconsciously and unintentionally repealed by the Local Legislature. If the local authorities are right the statute remains in force, although ejected from both the Dominion and the local statute book. In either view the result is a somewhat amusing one, or it would be amusing were it not likely some day to prove anything but a laughing matter to the unfortunate suitor at whose expense the differences between these eminent authorities will have to be composed. At all events this illustration will serve to show the kind of questions with which he will have to wrestle, and it may be fairly assumed that when such differences of opinion are possible, and lawyers of eminence and ability are found holding opposite views upon the serious constitutional questions presented by a number of provisions of the Act, the task that lies before the draftsman is no light one, even if his aim be no higher than that of adapting to the circumstances of this country the English "Bills of Exchange Act, 1882."

I certainly hope that nothing less than this will be attempted, but it would indicate a poor ambition on the part of our Canadian lawyers to be mere plagiarists of the productions of other countries. We have the admission of Judge Chalmers himself that his work is imperfect, and that if he had to go over the ground again he would not be content with the Act that has been produced, excellent and useful though it is. We know further the limitations under which it was produced. It started with a prejudice against it owing to the

belief widely entertained by English lawyers of the impracticability of embodying in definite terms the elastic principles of the common law. The draftsman was obliged to confine himself in the first instance to a statement of the actual common law, and to attempt no innovations, however obviously necessary they might be, leaving it to the Committee of the House to make the requisite modifications and additions. A comparison of the statute with the digest will show that quite a number of changes in the law were thus made, and a number of points that were doubtful before the passing of the Act, and for us in this country still present a virgin soil for litigation, are settled in a clear and satisfactory way. But a number of questions remain upon which it would be just as easy for the Legislature to give authoritative answers now as it will be for the courts when the questions present themselves in the concrete form of actions at law. The full discussion of this point would involve a consideration of the burning question of codification upon which in the abstract I do not propose to enter. But, simply to refer to a few illustrative details, what objection could there be to a statutory definition of the term money in the rule that requires a note to be payable in that medium? The answer to the question might be made very simple, while the matter has, in fact, been made by the courts very obscure. Why not determine by statute when a note payable by instalments is overdue, whether for the purpose of requiring notice of dishonour or for the purpose of affecting a subsequent holder with notice equities? Why not settle in the common-sense fashion of the Continental codes the liability assumed by a stranger who endorses a bill intending to be security for its payment? Why not remove by statute the absurd and arbitrary distinction between a note payable on demand and a note payable at a specified period after demand, as to the necessity of notice as a condition precedent to a right of action? What harm would there be in settling by statute all the questions that present themselves as to when the right of action is complete against the drawer or endorser where the bill has been dishonoured for non-acceptance? It would be just as easy to answer these and a hundred other questions that could easily be suggested, and to provide for them by statute now, as to leave them to be settled by the slow, painful and extremely expensive process by which the greater part of our existing law on the subject has been built up. The sub-

ject is peculiarly a proper one for this method of treatment. Nearly all the civilized nations of the world have already codified their law upon this subject, and in the effort to make a perfect code we should derive material assistance from the various Continental codes which deal with some of the points I have adverted to in a much more rational manner than that in which they are disposed of either by our own uncodified law or by the English statute. We may, in fact, have our choice of the solutions presented by the Continental codes, the English Bills of Exchange Act and the immense collations of case law to be found in the reports of the neighbouring republic. We can choose the best rules offered by all these various sources, secure an Act that will approximate perfection and make a very valuable contribution towards the international code which, it is to be hoped, will be devised at no very distant day.

ABBREVIATIONS

The only abbreviation which may not be familiar is that used to designate the Journal of the Canadian Bankers' Association, viz., J. C. B.

TABLE OF CASES CITED

Names of Cases Cited.	Where Reported.	Page of Vol.
Casborne v. Dutton	Selwyn's N. P. (13th Ed.), 329	441
Castrique v. Bernabo	6 Q. B., 498	274, 302
Caton v. Caton	L. R., 2 H. L., 127	45, 46
Caunt v. Thompson	18 L. J. (C. P.), 125	335
Central Bank, Re	17 Ont. R., 574	53
Chadwick v. Allen	2 Stra., 706	83
Chalmers v. Lanion	1 Camp., 383	225
Chamberlain v. Young	(1893), 2 Q. B., 206	85
Chambers v. Miller	32 L. J. (C. P.), 30	386
Chandler v. Beckwith	2 N. B. R., 423	141
Chapman v. Keane	3 Ad. & E., 193	313
Chester v. Dorr	41 N. Y., 279	215
Childs v. Monins	2 Bro. & B., 460	176
Citizens' Nat. Bank v. Richmond	121 Mass., 110	390
City Bank, Ex parte	L. R., 3 Ch. 758	15
City Bank v. Cheney	15 U. C. (Q. B.), 400	174
City Bank v. Ley	1 U. C. (Q. B.), 192	341
City Bank v. Rowan	2 J. C. B., 240; (1893), N. S. W. R. Law, 127	94
Clarke v. London & County Bkg. Co.	(1897), 1 Q. B., 552	438
Clement v. Cheesman	27 C. D., 631	422
Clutton v. Attenborough	(1897), A. C., 90	89
Cohen v. Hale	3 Q. B. D., 371	419
Colehan v. Cook	Willes, 393	97, 98, 100
Coleman v. Sayer	1 Barnardiston, 303	142
Collins v. Martin	1 B. & P., 648	198
Commercial Bank v. Allen	10 Man. R., 330	319
Commercial Bank v. Bissett	7. Man. R., 586	285
Commercial Bank v. Weller	5 U. C. (Q. B.), 543	315
Concha v. Murietta	40 Ch. D., 543	414
Cook v. Dodds	6 O. L. R., 608	20, 449
Cook v. Fowler	L. R., 7 H. L. 27	371, 372
Cook v. Lister	32 L. J. (C. P.), 121	386
Cook v. Wright	1 B. & S., 559	189
Cooper v. Waldegrave	2 Beav., 282	372, 373
Corbett v. Clark	30 Am. Rep., 763	70
Cossitt v. Cook	5 R. & G. (N. S.), 84	183
Cottage Street Methodist Church v. Kendall	121 Mass., 528	190
Counsell v. Livingston	4 O. L. R., 340	316, 318
Cowie v. Stirling	6 E. & B., 333	73
Cox v. Troy	5 B. & Ald., 474	136
Craig v. Samuel	24 S. C. R., 278	24
Creighton v. Halifax Banking Co.	18 S. C. R., 140; 22 N. S. R., 321	361
Crepeau v. Beauchesne	Q. R., 14 S. C., 495	448
Cripps v. Davis	12 M. & W. 159	385
Crofts v. Beale	11 C. B., 172	180
Crosse v. Smith	1 M. & S., 545	316
Crossley v. Ham	13 East., 498	252
Croxen v. Worthen	5 M. & W., 5	294
Crutchley v. Clarence	2 M. & S., 90	118
Currie v. Misa	L. R., 10 Ex., 153	179, 202, 204
Currier v. Lockwood	40 Conn., 349; 1 Ames' Ca. on B. & N., 21	444, 445
Curtis v. Clarke	133 Mass., 509	191

Names of Cases Cited.	Where Reported.	Page of Vol.
Wilson v. Pringle	14 U. C. (Q. B.), 230	328
Windham Bank v. Norton	23 Conn., 214	290, 330
Wirth v. Austin	L. R., 10 C. P., 689	292
Wise v. Charlton	4 Ad. & E., 786	69, 445
Wood, Bacon & Co. v. Kelso	27 Penn., 241	376
Woodthorpe v. Lawes	2 M. & W., 109	312
Woodman v. Thurston	8 Cush. (Mass.), 157	476
Woodward v. Pell	L. R., 4 Q. B., 55	224
Woods v. Dean	3 B. & S., 101	333
Wright v. Shawcross	2 B. & Ald., 501, note (a)	328
Wright v. Wright	6 U. C. (P. R.), 295	181
Wylde v. Wetmore	7 N. S. R. (1 G. & O.), 504	266
Yates, Ex parte	2 DeG. & J., 191	492
Yates v. Evans	61 L. J., Q. B., 446	446
Yglesias v. River Plate Bank	3 C. P. D., 60, 330	396
Young v. Glover	3 Jur. (N. S.), 637	8, 121, 223, 233, 240
Young v. Grote	4 Bing., 253	12, 13, 212, 481
Zimmerman v. Anderson	67 Penn., 421	68, 69

NOTANDA ET CORRIGENDA

The utility of this book will be greatly increased if the reader will note up the following entries which add to, and in a few instances modify the statements contained in the text. The greater part of these notes are taken from the answers to correspondents in the Journal of the Canadian Bankers' Association.

CITATION OF CASES.—All citations of cases have been carefully verified, and some errors in the text have been corrected in the table of cases. If any case cited in the text is not found, the reader should consult the table of cases.

PAGE

10. Holder. Can one be, without endorsement of payee? See Notes and Queries, p. 471.
14. In section 2, sub-section (*l*), defining "business days," the word "holiday" should be inserted after the word "legal," in the second line.
48. Firm inaccurately named in signature. See Notes and Queries, p. 487.
48. Initials. See Notes and Queries, p. 474.
108. Effect of making bill payable "with bank interest." See Notes and Queries, p. 467.
110. Current rate of Exchange; 60 days rate. See Notes and Queries, pp. 477, 478.
126. Acceptance after maturity under power of attorney. See Notes and Queries, p. 475.
127. What constitutes acceptance? Taking a post-dated cheque in lieu thereof. See Notes and Queries, p. 477.
127. Certification of cheque, effect of. See Notes and Queries, p. 479.
127. Certifying cheque good for two days only. See Notes and Queries, p. 482.
129. Draft enfaced payable at particular bank. See Notes and Queries, p. 473.
132. Post-dated acceptance. See Notes and Queries, p. 483.
143. Acceptance to pay on due date. See Notes and Queries, p. 475.
156. Forged indorsements, etc. See Notes and Queries, p. 488.
167. Certification of cheque, effect of. See Notes and Queries, p. 479.
167. Certifying good for two days only. See Notes and Queries, p. 482.
177. Consideration, mere fact of renewal is not. See Notes and Queries, p. 467.
177. Value. Banker depositing post-dated cheque to holder's credit. Is it holder for value? Notes and Queries, p. 471.

PAGE

211. Concluding sentence of paragraph was meant to state the law as of the time when the case referred to was decided. Some such words as these should be added: "This principle is somewhat qualified by proviso in section 145, page 398."
221. Pending action. See Notes and Queries, p. 470.
230. Endorsement of cheque payable deceased insolvent. See Notes and Queries, p. 473.
233. Indorsement by stamp. See Notes and Queries, p. 477.
237. Indorsement using initials. See Notes and Queries, p. 474.
240. Reconversion of special indorsement into indorsement in blank, or substitution of new special indorsee. See Notes and Queries, p. 468.
241. Endorser of bill payable to bearer, liable. See Notes and Queries, p. 474.
254. Compare case referred to in Notes and Queries, p. 471, last paragraph.
260. With the cases cited on this page compare case in Notes and Queries, p. 489.
291. Waiver of presentment. See Notes and Queries, p. 476.
338. Co-maker being surety. Is he entitled to notice of dishonour? See Notes and Queries, p. 487.
338. Protest. Effect of no-protest slip. See Notes and Queries, p. 475.
343. Protest for better security. See Notes and Queries, p. 477.
346. Time for protest where bank not open on due date. See Notes and Queries, p. 475.
364. Contribution between endorsers. See Notes and Queries, p. 470.
387. Holder's identity, payment to wrong person. See Notes and Queries, p. 477.
395. Discharge by renuncaition. See Notes and Queries, p. 483.
398. Raised cheques. See Notes and Queries, p. 488.
398. Under section 146, consult Notes and Queries, pp. 491, 492, 493.
407. Lost half of note. See Notes and Queries, p. 490.
419. Countermand of cheque. See Notes and Queries, p. 482.
419. Reasonable time a question of fact. See Notes and Queries, p. 479.
449. "Joint and Several." Dictum of Cave, J. See Notes and Queries, p. 469.

AN ACT

RELATING TO

Bills of Exchange, Cheques and Promissory Notes.

INTRODUCTORY.

The Bills of Exchange Act, 1890, was assented to on the 16th of May, but it did not come into force until the first day of September, 1890.

The Act is **not retrospective.** Judge Chalmers and Mr. Justice Maclaren both say the former referring to the English,[1] and the latter to the Canadian statute,[2] that the Act is not to be construed as retrospective.

But applicable to future transactions relating to instruments previously issued.—Mr. Justice Maclaren adds to his statement just quoted the further remark that the parts of the statute that make new law are applicable in the case of transactions and matters connected with instruments issued before the act came into force, for instance, the acceptance after September 1st, of a bill issued before that date, or the protesting of a bill so issued for a dishonour occurring after that date. The act having been in force now for more than seventeen years the matter is no longer of importance. It is sufficient to say that it must be governed by the general principles of construction, there being nothing in the statute to displace the ordinary rule.

Is the Act merely declaratory?—A more debateable question has arisen whether, and to what extent, the act is to be read merely as declaratory of the existing law. Judge Chalmers in his earlier editions, referring to the English act said, that where the law was not plainly altered by the act, the inclination of the courts would be

[1] *Chalmers on Bills*, 6th Ed., p. 2.
[2] *Maclaren on Bills*, 3rd Ed., p. 9.

to give effect to it as purely declaratory, and the dictum of Lord Blackburn in " McLean v. Clydesdale Banking Company " (1883),[3] was cited to this effect:—" I think that the enactments in that act are very good evidence of what had been the general understanding before it was passed, and of what the law was upon the subject." Lord Esher, M. R., is also quoted by Mr. Justice Maclaren where he speaks or the act, in Vagliano's case,[4] (1889), as " the codifying act which declares what was and is the law." It is to be observed that the English act is entitled an Act to codify the law relating to Bills of Exchange, Cheques and Promissory Notes, and, although the title forms no part of the act, it was very naturally assumed that in determining the question of construction there was a sort of presumption in favor of the reading that would make it conform to the existing law. The Canadian act is entitled simply an Act in relation to Bills of Exchange, Cheques and Promissory Notes, and Mr. Justice Maclaren, moreover, finds in the fact that the laws of the several provinces varied considerably before the passing of the statute a reason why it cannot here be so generally accepted as declaratory of the old law as it could be in England.[5] But even there, the current of opinion has changed and it is no longer considered that the act should be read with any presumption in favor of the existing law.

Rule of construction in " Vagliano's " case.—In "Vagliano's " case the question presented, so far as it concerns the point now under consideration, was whether the provision of the statute by which it was enacted that " where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer,"[6] was to be read without qualification or subject to the qualification recognized before the passing of the act, that the bill could be so treated only as against a person having knowledge of the fictitious nature of the transaction. The court below held that the section must be read as containing this qualification, on the ground that it was only intended to embody the existing law. But Lord Herschell, in the House of

[3] 9 A. C., at 106.
[4] 23 Q. B. D., at 248.
[5] *Maclaren on Bills*, 3rd Ed., p. 19.
[6] Sec. 21, (5).

Lords, referring to this view, used the following language:[7]

"The conclusion at which the majority of the Court of Appeal arrived, with reference to the construction of the sub-section of the Bills of Exchange Act with which your Lordships have to deal, is thus stated: 'The word fictitious must in each case be interpreted with due regard to the person against whom the bill is sought to be enforced. If the drawer is the person against whom the bill is to be treated as a bill payable to bearer, the term fictitious may be satisfied if it is fictitious as regards himself, or in other words, fictitious to his knowledge. If the obligations of the acceptor are in question, and the acceptor is the person against whom the bill is to be so treated, fictitious must mean fictitious as against the acceptor, and to his knowledge. Such an interpretation is based on good sense and sound commercial principle.'

"The conclusion thus expressed was founded upon an examination of the state of the law at the time the Bills of Exchange Act was passed. The prior authorities were subjected by the learned judges who concurred in this conclusion to an elaborate review, with the result that it was established to their satisfaction that a bill made payable to a fictitious person or his order was as against the acceptor in effect a bill payable to bearer, only when the acceptor was aware of the circumstance that the payee was a fictitious person, and further, that his liability in that case depended upon an application of the law of estoppel. It appeared to those learned judges that if the exception was to be further extended it would rest upon no principle and that they might well pause before holding that section 7, sub-section 3, of the statute, (sec. 21 (5) of chap. 119, R. S. 1906), was 'intended not merely to codify the existing law, but to alter it and to introduce so remarkable and unintelligible a change.'"

The words of the Act must be read with their natural meaning uninfluenced by the previous law.—Lord Herschell, after quoting these words from the judgment of Bowen L. J., in the Court of Appeal, proceeds to say: "My Lords, with sincere respect for the learned judges who have taken this view, I cannot bring myself

[7] 1891, Ap. Ca. at 144.

to think that this is the proper way to deal with such a statute as the Bills of Exchange act, which was intended to be a code of the law relating to negotiable instruments. I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

"If a statute intended to embody in a code a particular branch of the law is to be treated in this fashion it appears to me that its utility will be almost entirely destroyed and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that, on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence."

The old law may be looked at to construe a provision of doubtful meaning, or explain a technical term, &c.— Lord Herschell proceeds to say: "I am, of course, far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning or been used in a sense other than their ordinary one in relation to such instruments, the same interpretation may well be put upon them in the code. I give these as examples merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon is that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground."

Not a mere code of existing law.—Lord Herschell continues: "One further remark I have to make before I proceed to consider the language of the statute. The Bills of Exchange Act was certainly not intended to be a mere code of the existing law. It is not open to question that it was intended to alter and did alter it in certain respects. And I do not think that it is to be presumed that any particular provision was intended to be a statement of the existing law rather than a substituted enactment."

Cases decided before the Act must be considered.—It will be observed that Lord Herschell carefully refrains from saying that the cases which he mentions are the only ones in which reference may properly be made to the law as it stood before the passing of the Bills of Exchange Act. He gives those cases as examples merely: "they, of course, do not exhaust the category." Where there has been no intention to change the law the cases that were decided before it passed are useful as illustrations of the application of its principles, and where the law has been changed the earlier cases may have to be considered for the purpose of applying Lord Cokes' canon of construction, which is as applicable to this as to any other statute, that the old law, the mischief and the remedy must be considered in order to give the statute its proper interpretation. Furthermore, as Mr. Justice Holmes is quoted by Judge Chalmers in the introduction to the third edition of Chalmers on Bills,[8] "However much we may codify the law into a series of seemingly self-sufficient propositions those propositions will be but a phase in a continuous growth. To understand their scope fully, to know how they will be dealt with by judges trained in the past which the law embodies, we must ourselves know something of that past. The history of what the law has been is necessary to the knowledge of what the law is." For these reasons, constant reference will be found throughout the following pages to the cases decided before the passing of this act.

[8] *Chalmers on Bills*, 6th Ed., p. xliv.

CHAPTER 119 OF THE REVISED STATUTES OF CANADA, 1906.

FULL TITLE. **An Act relating to Bills of Exchange, Cheques, and Promissory Notes.**

His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

SHORT TITLE.

Short title. **1. This Act may be cited as the Bills of Exchange Act. 53 V., c. 33, s. 1. [E. s. 1.]**

Short history of the Act.—The chapter is for the most part a transcript of the English Bills of Exchange Act, 1882, 45 and 46 Vict. ch. 61, which was drafted by Judge Chalmers and founded upon his digest of the law of Bills of Exchange and Promissory Notes, published in 1878. The Act was adopted here in 1890, as already stated, and was amended in 1891 by chapter 17 of 54-55 Vict.; in 1893, by chapter 30 of 56 Vict.; in 1894 by chapter 55 of 57-58 Vict.; in 1897, by chapter 10 of 60-61 Vict.; in 1901, by chapter 12 of 1 Edw. VII., and in 1902, by chapter 2 of 2 Edw. VII. All these enactments were consolidated in the Revised Statutes, 1906, by the present chapter 119, or else repealed by that chapter.

INTERPRETATION.

Definitions. **2. In this Act, unless the context otherwise requires:—**

'Acceptance' **(a) "Acceptance" means an acceptance completed by delivery or notification. 53 V. c. 33, s. 2. [E. s. 2.]**

Acceptance complete without delivery if communicated.—This clause is not a definition of the term "acceptance," although from its position and context a definition would be looked for. It merely sets out one of the requisites of a valid acceptance. The others are stated in section 35 and following sections. The acceptance, in order to be complete, does not require delivery. It is expressly provided by section 39 that where the acceptance is writ-

ten on the bill and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable. The section last mentioned is enacted by way of proviso to a section declaring that every contract on a bill, whether it is the drawer's, the acceptor's, or any endorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto. It would have been simpler to have said that while every contract on a bill other than that entered into by the acceptor is incomplete until delivery, the acceptor's contract is complete without delivery if perfected by notification, the reason for the difference being that every other contract on a bill results in a transfer of title, while the acceptance has no effect on the title and is therefore complete without delivery. This is the view of Professor Ames,[9] as to which see further comments under section 39.

'Action.'

(b) "Action" includes counter-claim and set-off. 53 V. c. 33, s. 2. [E. s. 2.]

Distinction between set-off and counter-claim.—For the difference between counter-claim and set-off, the reader will naturally consult a book on pleading, such as Odgers on Pleading, in which the matter is clearly discussed.[10] Mr. Justice Maclaren also considers the subject in his work on Bills and Notes,[11] but further consideration will not be given to the topic here for the reason that the term "action" as used in the act includes both counter-claim and set-off, and it does not, therefore, seem necessary for the purpose of construing or applying the act to distinguish the one from the other.

"Bank" defined.

(c) "Bank" means an incorporated bank or savings bank carrying on business in Canada. 53 V. c. 33, s. 2. [E. s. 2.]

The term "Banker" used in English Act.—The English Act defines the term "Banker" which is used in that act as including any body of persons whether incorporated or not, who carry on the business of banking. Sir

[9] 2 *Ames Cases on Bills*, 790.
[10] *Odgers on Pl.*, 6th Ed. p. 234.
[11] *Maclaren on Bills*, 3rd Ed., p. 21.

John Thompson explained as to this clause in committee that "inasmuch as our banking institutions in this country are corporations, the definition has been made to correspond with our system in Canada." [12] The reason for including Savings Banks was also stated in committee.[13]

"Bearer" defined.

(d) "Bearer" means the person in possession of a bill or note which is payable to bearer. 53 V. c. 33, s. 2. [E. s. 2.]

When is a bill payable to bearer?—It will be seen later that a bill is payable to bearer when it is expressed to be so payable, or when the only or last endorsement is an endorsement in blank,[14] that is an endorsement which specifies no indorsee, being simply the signature of the payee or subsequent holder, written normally across the back of the bill, although it may be written across the face of the bill, as in "Young v. Glover." [15]

It follows from this definition as stated by Judge Chalmers, that the possessor of a bill or note payable to order is not technically the "bearer" of it.[16] Mr. Justice Maclaren further points out the distinction between possession and ownership, saying that the bearer need not be the owner of the bill.[17]

Where the payee indorses and keeps possession, is he a bearer?—The question, it would seem, involves a contradiction in terms. He cannot indorse and keep possession. Indorsement means an indorsement completed by delivery (s. s. h, infra). Mr. Paget, in the Gilbart Lecture III., says: "He cannot deliver to himself. The payee remains the holder. He does not become the bearer." But this may be questioned. Does the statute require delivery in order to complete indorsement where the person intended to hold after indorsement already has the document? May the case not be the same as those where "acutal receipt" under the Statute of Frauds is satisfied by the vendee being already in possession? It seems odd to say that the note is not payable to

[12] *Canada Hansard*, 1890, Vol. 1, p. 105.
[13] *Canada Hansard*, 1890, Vol. 1, p. 1519.
[14] Section 21 (3).
[15] 3 *Jurist*, N. S., 637.
[16] *Chalmers on Bills*, 6th Ed., p. 4.
[17] *Maclaren on Bills*, 3rd Ed., p. 24.

bearer after the payee has written his name across the back. It could certainly thereafter be transferred by mere delivery. If it is "payable to bearer," the person in possession, to wit, the payee, is by the terms of the clause, the bearer.

"Bill" and "note" are abbreviations.

(e) "Bill" means bill of exchange, and "note" means promissory note. 53 V. c. 33, s. 2. [E. s. 2.]

Fuller definitions deferred.—See "Bill of Exchange" defined in section 17, and Promissory Note defined in section 176. The term Cheque is defined in section 165.

Law as to bills applies generally to notes and cheques.—The provisions as to bills of exchange apply also to promissory notes, with the necessary modifications and subject to the provisions of part IV., which relates specially to promissory notes. Inasmuch as a cheque is defined to be a bill of exchange drawn on a bank payable on demand, the provisions of the act as to such bills apply to cheques, except as otherwise provided in part III., which relates to cheques.

"Delivery" defined.

(f) "Delivery means transfer of possession, actual or constructive, from one person to another. 53 V. c. 33, s. 2. [E. s. 2.]

Delivery requisite to complete contracts on bills, except acceptance.—Section 29 enacts, subject to the proviso as to acceptance being completed by notification without delivery, that every contract on a bill whether it is the drawer's the acceptor's or any indorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto. See also note under subsection i (post.)

Constructive possession defined.—Mr. Justice Maclaren, following Judge Chalmers, says that one has constructive possession of a thing when it is in the actual possession of his servant or agent on his behalf, and cites a case from Illinois of "Williams v. Galt,"[18] where bankers indorsed a note to a customer and put it in an enve-

[18] 95 Ill., 172 (1880).

lope with his papers, at the same time making appropriate entries of the transaction in their books, and it was held to be a sufficient delivery to him which could not be defeated by a subsequent assignment of the bankers.

Three cases of the transfer of constructive possession are given by both authors, the first, where a bill is held by one person on his own account who afterwards becomes the holder of it for another; the second, where the bill is held for another person by an agent who afterwards attorns to a different party and holds as agent for him; the third, where a bill is held by one person as agent for another, and the agent subsequently holds it on his own account. In none of these cases is there any transfer of actual possession, but in all there is perfect delivery.

"Holder" defined.

(g) "Holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof. 53 V. c. 33, s. 2. [E. s. 2.]

Holder defined; need not be the legal owner.—Under this definition the term holder includes bearer as already defined. That is to say the holder is the payee or indorsee who is in possession of the instrument or the person in possession of a bill or note which is payable to the bearer, whether so made originally or having become so by virtue of an indorsement in blank. The holder, Mr. Justice Maclaren says, may or may not be the legal owner. "If the payee or indorsee indorse the instrument in blank and send it to another person for discount, collection or some other special purpose, the latter, while in possession, would be the holder; 'Allison v. Central Bank.'"[19]

May be an unlawful holder; but not a mere wrongful possessor, e. g., possessor of stolen bill or note drawn to order.—The term is used as Judge Chalmers says,[20] to denote "inter alios" un unlawful holder, that is the person to whom a bill is by its terms payable, whose possession is unlawful, e. g., the finder of a bill indorsed in

[19] 9 N. B., 720 (1859), cited in *Maclaren on Bills*, 3rd Ed., at p. 25.
[20] *Chalmers on Bills*, 6th Ed., p. 5

blank, but who nevertheless, can give a valid discharge to a person who pays it in good faith and for value. He points out, however, that an unlawful holder must be distinguished from a mere unlawful possessor, e. g., a person holding under a forged indorsement, or a person who has stolen a bill payable to the order of another. Such person, he says, has no rights and can give none.

(h) "Indorsement" means an indorsement completed by delivery. 53 V. c. 33, s. 2. [E. s. 2.]

Indorsement is incomplete until delivery.—The draftsman has in this case, as in the case of the term acceptance, made use in his definition of the term defined. But the section is obviously not intended in either case as a definition.

The difference between "acceptance" and other contracts on a bill has already been referred to and is illustrated by this section with reference to indorsement.

Delivery by executor will not complete indorsement written on bill by testator.—The case of 'Bromage v. Lloyd,'[21] illustrates the necessity of delivery to complete the indorsement, and further decides that an executor cannot by his delivery of the instrument, supplement and complete the act of the testator who has written his name on the back of it. In that case, the declaration was that the defendant promised to pay Mr. Lloyd Harris, or order, since deceased, £300 0. 0.; that he indorsed it without making any delivery, and after his death his executor delivered it to the plaintiff. Alderson, B., said: "The promissory note was made payable to the testator or order. That means order in writing. The testator has written his name upon the note, but has given no order: the executrix has given the order, but not in writing. The two acts being bad do not constitute one good act."

The requisites of a valid indorsement are stated in section 32.

Various Kinds of Indorsement.—The various kinds of indorsement, indorsement in blank, special indorsement,

21 1 Exch., 32 (1847).

and restrictive indorsement, are defined in sections 67 and 68.

"Issue" defined.

(f) "Issue" means the first delivery of a bill or note, complete in form, to a person who takes it as a holder. 53 V. c. 33, s. 2. [E. s. 2.]

Undated bill is complete in form within this section.—The completeness in form here required in order to the "issue" of a note or bill does not call for the insertion of the date. An undated bill or note is complete in form within the meaning of this section and undated bills are referred to in different sections of the act as having been "issued," e. g., in section 30 and sub-section 3 of section 28.

Delivery is essential to the issue of bill or note; Stolen bill.—The "issue" of a bill or note must be distinguished from the case of a document being stolen and put in circulation. In 'Baxendale v. Bennett,'[22] the defendant gave one Holmes his blank acceptance on a stamped paper and authorized him to fill in his name as drawer. He returned it without doing so and defendant put it in his drawer unlocked, from which it was lost or stolen and wrongfully filled up. Bramwell, L. J., held that the defendant was not estopped from setting up the facts, and that if he had been negligent, the negligence was not the proximate or effective cause of the fraud. Brett, L. J., differred from the reasoning of Bramwell, L. J., but came to the same conclusion on the ground that the bill had not been issued. The defendant had never authorized anyone to fill it up and issue it. The case would have been different if the bill had been issued in blank and filled up in a manner contrary to the instructions. The defendant would, in that case, have been liable to a bona fide holder. The cases of 'Young v. Grote,'[23] and 'Ingram v. Primrose,'[24] were distinguished by Bramwell, L. J., on the ground that in those cases the alleged maker or acceptor had voluntarily parted with the instrument, although he admitted that those cases went a long way towards justifying the judgment of the trial judge that the defend-

[22] 3 Q. B. D., 525 (1878).
[23] 4 Bing. 253 (1827).
[24] 7 C. B. N. S., 82, 28 L. J. C. P., 294 (1859).

ant was liable because of his negligence. But neither of these cases can be depended upon. Mr. Ames regards 'Ingram v. Primrose,' as overruled by 'Baxendale v. Bennett,'[25] and 'Young v. Grote,' is considered by Brett, L. J., to have been shaken by the observations of the House of Lords in the case of 'Bank of Ireland v. Evans' Charity Trustees.'[26] The further consideration of these cases would not be relevant to the question here discussed. They will be considered under the sections relating to discharge, and to the position of a holder in due course.

Delivery through post-office.—Mr. Daniel says that placing bills or notes, signed or indorsed, in the custody of the postman, addressed to the payee or indorsee—that being the course of business between the parties—has been held in England a sufficient delivery, and so depositing them in the post office with the assent of the payee or indorsee is considered sufficient in the United States The English case cited is "Rex v. Lambton."[27]

"Value" defined.

(j) "Value" means valuable consideration. 53 V. c. 33, s. 2. [E. s. 2.]

Discussion of consideration deferred.—The subject of the consideration for a bill or note is fully discussed under section 53 and the sections immediately following.

"Defence" includes counter-claim.

(k) "Defence" includes counter-claim 53 V. c. 33, s. 2. [E. s. 2.]

Defence includes counter-claim. Does it include set-off?—Note that by sub-section b (supra), it is enacted that the term "action" also includes counter-claim, and that while a set-off is included under the term "action," it is not here said to be included in the term "defence." This is probably an oversight. It would seem that if the term "defence" includes a counter-claim it should a fortiori include a set-off.

[25] 2 *Ames cases on B. & N.*, 812, 867.
[26] 5 H. L. C., 389.
[27] 1 *Daniel on Neg. Inst.*, p. 86.

"Non-business day" and "business day" defined.

(1) "Non-business days" means days directed by this Act to be observed as legal or non-juridical days.

2. Any day other than as aforesaid is a business day. 53 V., c. 33, ss. 2 and 91. [E. s. 2.]

Legal holidays enumerated in subsequent section.—In section 43 will be found an enumeration of the days to be observed as "legal holidays or non-juridical days" in all matters relating to bills of exchange.

PART I.

GENERAL.

"Good faith" is honesty, but may consist with negligence.

3. A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly whether it is done negligently or not. 53 V., c. 33, s. 89. [E. s. 90.]

Good faith has relation chiefly to the position of a transferee from one with a defective title.—The importance of this definition is in its bearing upon such transactions as the transfer of negotiable paper to a holder where the title of his transferor is defective, but he takes it without notice, in good faith and for value. The history of the controversy which gives rise to this section, will be found in the discussion at a later page, under section 56.

"Writing" may be signed by another's hand.

4. Where by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority. 53 V., c. 33, s. 90. [E. s. 91.]

Definition of "sign" deferred.—The cases that define the meaning of the term "sign," will be found under section 17 (post.) The definition of a bill of exchange requires that it should be signed, sec. 17. So also as to a promissory note, sec. 176. A cheque is defined as a bill

of exchange drawn on a bank, payable on demand, sec. 165. It must therefore be signed and the cases under the section referred to will be equally applicable to promissory notes and cheques.

Signature by agent is good.—In all these cases it is a sufficient signing of the instrument if the signature is written by the authority, although not by the hand of the person whose signature is so written. The New York Act,[28] sec. 38, provides that "the signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose, and the authority of the agent may be established as in other cases of agency." This seems to be a fair statement of the law as to such signatures by an agent. The authority of the agent may appear on the instrument, but it is not necessary that it should. If the authority is proved, the signature is binding, and of course that authority need not be given in writing and may be proved by the same sort of evidence as in other cases of agency.

Instrument of corporation sufficient if sealed but seal not requisite to bill or note.

5. In the case of a corporation, where, by this Act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing is duly sealed with the corporate seal; but nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal. 53 V., c. 33, s. 90. [E. s. 91 (2).]

Capacity of corporations discussed later.—It should, perhaps, be stated that nothing in this section is intended to say that a corporation can draw or accept a bill of exchange or make a promissory note. Some corporations can do this and others cannot. Their capacity to become liable on such instruments is discussed under section 47. In "Ex parte City Bank,"[29] it was thought by by Sir Page-Wood and Sir C. J. Selwyn, L. J., that the document there in question, which was issued under seal by a corporation and called a debenture, was really a promissory note; but Mr. Justice Maclaren properly

[28] *Laws of New York*, 1897, Cap. 612
[29] L. R. 3, Ch. 758 (1868)

says that before the Act it was doubted whether an instrument in the form of a note, but under the seal of a company, was a negotiable note, and in one of the cases which he cites it was expressly decided in Upper Canada that a document which in every other respect would pass for a promissory note, was not a note, because it was sealed by the makers.[30] This was the case of a note made by individuals and not by a corporation. The case of a corporation is different, for the reason stated by Sir C. J. Selwyn in the case above referred to, that in the absence of any special power an instrument under seal is the only instrument by which a corporate body can contract at all. This is not an accurate, or at least it is not an exhaustive statement of the law as to the capacity of corporations to contract, but it points to the difference between a corporation and an individual. An individual who seals an instrument intends to make it a specialty. A corporation does not necessarily intend this, whatever the effect may be. The case may be one where its act would not be binding upon it at all except under seal, and the affixing of the seal in such a case is not for the purpose of making a specialty, but simply of making the contract a binding one. It was, doubtless, to obviate questions of this kind that this section was passed.

Time less than three days excludes business days.

6. Where, by this Act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded. 53 V., c. 33, s. 91. [E. s. 92.]

Cross reference.—See the term "non-business day," defined in sec. 2 (1), and the list of such days in sec. 43.

Crossed cheque provisions apply to dividend warrant.

7. The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend. 53 V., c. 33, s. 94. [E. s. 95.]

Cross reference.—The provisions referred to in this section are those contained in sections 168-175.

8. Nothing in this Act shall affect the provisions of the Bank Act. 53 V., c. 33, s. 95.

[30] *Wilson v. Gates*, 16 U. C. Q. B., 278 (1858).

No corresponding English statute.—There is no section corresponding to this in the English Act, and it may be doubted whether anything is accomplished by its insertion here. It was, no doubt, inserted as Mr. Falconbridge suggests with special reference to the sections of the Bank Act, chap. 29, Revised Statutes of 1906, from 61 to 75, on the issue and circulation of notes.

Certain Imperial acts declared not in force in Canada.

9. The Act of the Parliament of Great Britain passed in the fifteenth year of the reign of His late Majesty George III., intituled "An Act to restrain the negotiation of Promissory Notes and Inland Bills of Exchange under a limited sum within that part of Great Britain called England," and the Act of the said Parliament passed in the seventeenth year of His said Majesty's reign, intituled "An Act for further restraining the negotiation of Promissory Notes and Inland Bills of Exchange under a limited sum within that part of Great Britain called England," shall not extend or be in force in any Province of Canada, nor shall the said Acts make void any bills, notes, drafts or orders made or uttered therein. 53 V., c. 33, **s. 95.**

Short history of the Acts referred to in section.—The Imperial Acts here referred to were introduced into Upper Canada in 1792, by the first parliament of the new province; 32 Geo. III., cap 1. This statute provided that in all matters of controversy relative to property and civil rights resort should be had to the laws of England as the rule for decision. By 2 Geo. IV., cap. 12 (Ontario), it was declared that these Imperial Acts should not apply to Upper Canada. Mr. Justice Maclaren[21] says that the statutes mentioned in the section would be in force also in Manitoba, the North-West Territories and British Columbia. By this section they are expressly declared not to be in force in any province of Canada.

[21] *Maclaren on Bills*, 3rd Ed., p. 440.

Common law of England saved except where inconsistent

10. The rules of the common law of England, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act shall apply to bills of exchange, promissory notes and cheques. 54-55 V., c. 17, s. 8. [E. s. 97 (2).]

Common Law includes Law Merchant.—The section treats the common law as including the law merchant. Mr. Justice Maclaren[32] refers to the language of Cockburn, C. J., in Goodwin v. Roberts, L. R. 10 Ex., at 346, where he says that "the law mentioned is sometimes spoken of as a fixed body of law, forming part of the common law, and as it were coeval with it. But as a matter of legal history this view is altogether incorrect. The law merchant thus spoken of with reference to bills of exchange and other negotiable securities is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of the courts of law." Lord Campbell's remark in "Brandao v. Burnett," 12 Cl. & F., at 805, is also quoted, that "when a general usage has been judicially ascertained and established, it becomes a part of the law merchant, which courts of justice are bound to know and recognize." The relation of the law merchant to the common law is more fully discussed in the Introduction to the third edition of Chalmers on Bills, p. LIV. to LVII. of sixth edition.

Rule of Construction in Vaglianos case.—This section formed a part of the English Bills of Exchange Act, 1882 (sec. 97, sub-sec. 2.) Were this not so, it would be necessary to inquire whether its introduction here would not have the effect of modifying Lord Herschell's rule of construction adopted in Vagliano's case, 1891, A. C., 144. It is useful to repeat that rule in this place. The Court of Appeal had had recourse to decisions made before the Bills of Exchange Act was passed for the purpose of interpreting the provision of the Bills of Exchange Act that a bill payable to a fictitious or non-existing person might be treated as a bill payable to bearer, and they considered that this section must, in the light of the deci-

[32] *Maclaren on Bills*, 3rd Ed., p. 444.

sions made before the passing of the act, be limited to the extent of holding that such a bill could only be so treated as against parties aware of its fictitious nature. It would be arguable that under this section the rules of the common law, or the law merchant, could thus be invoked, not being inconsistent with any express provision of the act, unless the section could be read as expressly saying that in all cases such a bill might be treated as a bill payable to bearer. Lord Herschell's rule, that is the rule established by the House of Lords as best expressed by Lord Herschell, is that in such a case we must first examine the language of the statute and ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. Limitations to this rule of construction are also stated by Lord Herschell, for example, if a provision of the act were of doubtful import, a resort to the previous condition of the law would be perfectly legitimate. Or again, if words should be found in the act which had previously acquired a technical meaning, or had been used in a sense other than their ordinary one in relation to negotiable instruments, the same interpretation might well be put upon them in the code. "These of course," said his lordship, "are examples merely. They do not exhaust the category. What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground."

Illustrations of recourse to the common law or law merchant.—Mr. Justice Maclaren, in his comments on this section,[22] refers to the case of re Gillespie, 16 Q. B. D., 702, in which the question arose as to the right of the drawer of a foreign bill of exchange upon an acceptor in England to recover from the acceptor damages in the nature of re-exchange which the drawer was, by the

[22] *Maclaren on Bills*, 3rd Ed., p. 448.

foreign law, liable to pay the holder of the bill. It was contended that section 57 of the Bills of Exchange Act, corresponding to section 134 of this act, provided exhaustively for the subject of damages in such a case. It was held by the Court of Appeal that section 57, sub-section 1, under which the appellants made their contention, was not addressed to the precise point of the damages claimed, and that section 97, the one corresponding to the section now being commented upon, had been added to meet cases not exhaustively dealt with by the other sections of the Act.

On the other hand, in "Cook v. Dodds,"[33] where the note was by two persons, one of whom had died, and the objection was taken by defendant that it was a joint note and no right of action survived, Meredith, C. J., said: "The Bills of Exchange Act does not deal with the consequences which are to flow from the character which, according to its provisions, is attached to the promise which a bill or promissory note contains, whether that of a joint or joint and several liability. These consequences, in my opinion, fall to be determined according to the law of the province in which the liability is sought to be enforced, and, inasmuch as in this province the common law rule as to joint contracts has been superseded by statutory enactment, R. S. O. 1897, ch. 129, sec. 15, the provisions of the latter are to govern in determining the right of the respondent to sue in this province."

Corresponding article of the civil code.—Mr. Justice Maclaren[34] refers to the corresponding provision of the Civil Code of Quebec, Art. 2340, which provides that "in all matters relating to bills of exchange not provided for in this code, recourse shall be had to the laws of England in force on the 30th day of May, 1849." Under this law, as he points out, not only that part of the code relating to bills of exchange was to be looked at, but the whole code had to be considered, before recourse could be had to the laws of England. This section clearly changes the rule of construction for the Province of Quebec. The Bills of Echange Act is the law for the Province of Que-

[33] 6 O. L. R., 608 (1903).
[34] *Maclaren on Bills*, 3rd Ed., p. 445.

bec as it is for the rest of the Dominion. Where it is silent, recourse is to be had to the rules of the common law of England, including the law merchant. It is difficult to see that any place whatever is left for any rules of law peculiar to the Province of Quebec, and accordingly in "Noble v. Forgrave,"[35] it was held by the Supreme Court of Quebec, that the enactment of this section had modified the former law of Quebec by introducing into that province the law of England respecting the liability of makers of notes being only joint, and not joint and several, unless the latter liability was specially declared.

Compare with this the last paragraph of the preceding note.

Protest within Canada is *prima facie* evidence of presentation, etc.

11. A protest of any bill or note within Canada, and any copy thereof as copied by the notary or justice of the peace, shall, in any action be prima facie evidence of presentation and dishonor, and also of service of notice of such presentation and dishonor as stated in such protest or copy. 53 V., c. 33, s. 93.

Notarial copy of protest out Canada, and certificate of service, etc., are *prima facie* evidence of protest, etc.

12. If a bill or note, presented for acceptance, or payable out of Canada, is protested for non-acceptance or non-payment, a notarial copy of the protest and of the notice of dishonor, and a notarial certificate of the service of such notice, shall be received in all courts, as prima facie evidence of such protest, notice and service. 53 V., c. 33, s. 71 (f).

Cross References.—The rules as to the necessity for protest are set out in section 109 and the following sections. The two sections here given are mere rules of evidence. Neither of them appears in the Imperial act. The first section relating to protests within Canada seems to be taken in substance from Article 2305, of the Civil Code,[36] and the clause as to foreign protests is similar to the provision contained in chapter 57 of the Consolidated Statutes of Canada, 1859, except that the latter applied only to protests in Upper and Lower Canada.[37]

[35] Q. R., 17 S. C., 234 (1899).
[36] See *Maclaren on Bills*, 3rd Ed., at p. 438.
[37] See *Maclaren on Bills*, 3rd Ed., at p. 378.

Teller or agent of bank not to act as notary.

13. No clerk, teller or agent of any bank shall act as a notary in the protesting of any bill or note payable at the bank or at any of the branches of the bank in which he is employed. 53 V., c. 33, s. 51 (10).

Short history of section, etc.—This provision is not contained in the Imperial act. Mr. Justice Maclaren says it was first enacted for Upper and Lower Canada, in 1850, and made applicable to the whole Dominion by the Revised Statutes of Canada, R. S. C., 1886, chap. 123, s. 11. It does not clearly appear what consequences would follow the violating of this provision.

Bill or note for patent right must so indicate.

14. Every bill or note the consideration of which consists, in whole or in part, of the purchase money of a patent right, or of a partial interest, limited geographically or otherwise, in a patent right, shall have written or printed prominently and legibly across the face thereof, before the same is issued, the words "Given for a patent right."

Otherwise void except as to holder in due course.

(2) Without such words thereon, such instrument and any renewal thereof shall be void, except in the hands of a holder in due course without notice of such consideration. 53 V., c. 33, s. 30 (4).

Indorsee subject to defence or set-off.

15. The endorsee or other transferee of any such instrument having the words aforesaid so printed or written thereon, shall take the same subject to any defence or set-off in respect of the whole or any part thereof which would have existed between the original parties. 53 V., c. 33, s. 30 (5).

Penal consequences of omission of words "given for a patent right."

16. Every one who issues, sells or transfers, by endorsement or delivery, any such instrument not having the words "Given for a patent right" printed or written in manner aforesaid across the face thereof, knowing the consideration of such instrument to have consisted, in whole or in part, of the purchase

money of a patent right, or of a partial interest, limited geographically or otherwise, in a patent right, is guilty of an indictable offence and liable to imprisonment for any term not exceeding one year, or to such fine, not exceeding two hundred dollars, as the court thinks fit. 53 V., c. 33, s. 30 (6).

Short history of sections.—Mr. Justice Maclaren[38] gives the history of these sections, saying that they were not in the Imperial act, and were not a part of the bill as introduced into the House of Commons, but were inserted reluctantly by the Minister of Justice; Hansard, 1890, pp. 105, 1415, 1520. He explains further that the first sub-section of section 14 was passed in 1884, 47 Vic., c. 38; see R. S. C., 1886, chap. 123, sec. 12. The second sub-section was added in order to override the interpretation placed on the original act as embodied in section 12 of chapter 123 of the Revised Statutes by the Common Pleas Division in Ontario, in "Girvan v. Burke," 19 O. R., 204, in which it was held, following a Pennsylvania decision on a similar statute, that the omission of the prescribed words in a note, or renewal note, did not render it void as between the maker and the payee, that the intention of the act was to give the indorsee or transferee notice and to put him in the position of the payee as to any defence which the maker might have against any claim by the payee.

Comments on sections, with references to cases.—The definition of a "holder in due course" requires that such holder shall have taken a bill complete and regular on its face, having become the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact, and having taken the bill in good faith and for value, without notice of any defect in the title of the person who negotiated it. If he has notice of the consideration, and with such notice takes a bill on which the required words do not appear, he could not be a holder in due course under this definition. Therefore, the words "without notice of such consideration," seem to be superfluous. It was held in

[38] *Maclaren on Bills*, 3rd Ed., p. 194.

"Johnson v. Martin,"[30] that a promissory note made before the coming into force of the Bills of Exchange Act, 1890, the consideration of which was the purchase money of a patent right, without bearing the words, "given for a patent right," written or printed across the face when taken by the payee, or when transferred by him, as required by R. S. C., chapter 123, sections 12 and 14, was void in the hands of an indorsee for value with notice of the consideration. The decision in this case was not founded on the Bills of Exchange Act, 1890. It proceeded upon the ground that the transferee, knowing that the consideration of the bill was a patent right and that its transfer without the required words was a misdemeanor, could not stand in a better position than the payee. "This illegal transfer is an essential part of the contract on which he sues, and having knowingly been a party to the illegality he cannot recover; 'ex pacto illicito non oritur actio,'" per Maclennan, J., at p. 601 (19 O. A. R.)

In "Craig v. Samuel et al." 24 S. C. R., 279, the facts were that one, Fairgrieve, of the firm of Fairgrieve & Craig, was personally indebted to Samuel & Co., in the sum of $1,000. In order that Fairgrieve might be authorized to give the firm's name for the debt, a member of Samuel & Co.'s firm suggested that Craig should purchase a half interest in a patent of which Fairgrieve was the owner, for the sum of $700; $200 to be paid to Fairgrieve out of Craig's income from the business, and $500 by Craig joining Fairgrieve in a note to Samuel & Co. for the $1,000, due by Fairgrieve personally to Samuel & Co. The Ontario Appeal Court held, unanimously, that this note was not a note given for a patent; but the Supreme Court of Canada reversed the judgment and held, Taschereau, J., dissenting, that the consideration for Craig signing the note sued on was the transfer of the interest in the patent by Fairgrieve to him, and that only. If it were not so held, the act could be evaded in every case by the person who sold the patent making the notes given therefor payable to one cognizant of the consideration for which they were given, as had been done in this case.

[30] 19 O. A. R., 594 (1892).

PART II.

BILLS OF EXCHANGE.

Form of Bill and Interpretation.

This part applies also generally to promissory notes and cheques.—The clauses that follow apply to bills of exchange, but the act provides, (section 186), that subject to the provisions of the part relating to promissory notes and except as by section 186 provided, the provisions of the act relating to bills of exchange apply with the necessary modifications to promissory notes. The necessary modifications are suggested by sub-section 2, of section 186, which affirms the correspondence between the position of the maker of a note and that of the acceptor of a bill, and the correspondence between the position of the first indorser of a note and that of the drawer of an accepted bill payable to the drawer's order.

As a cheque is defined to be a bill of exchange drawn on a bank, payable on demand,[40] the provisions of the act applying to bills will also apply to cheques, except as otherwise provided in Part III. of the act, which is specially applicable to cheques.

Bill of exchange defined.

17. A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay, on demand or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer.

Must not require any act in addition to payment of money.

(2) An instrument which does not comply with the requisites aforesaid, or which orders any act to be done in addition to the payment of money, is not, except as hereinafter provided, a bill of exchange. 53 Vic., c. 33, s. 3. [E. s. 3.]

Order in bill and promise in note must be unconditional.—This section, following the standard definitions as established by the decided cases, defines a bill of

[40] Section 165.

exchange as "an unconditional order in writing" and Judge Chalmers, commenting on this definition, says that "it must in its terms be imperative and not precative."[41]

Mere precative request is not sufficient.—The distinction between an imperative order and a mere precative request is illustrated by a case in which the document was in the following terms:—"Messrs. Songer. Please to send me ten pounds by the bearer, as I am so ill that I cannot wait upon you. Elizabeth Wery."[42] This was pronounced by the court to be a mere letter rather requesting the loan of money than ordering the payment of it. The question did not arise whether it was a bill of exchange or not, but Professor Ames properly includes it in his collection of cases as a good example of what Judge Chalmers would call a mere precative request. The difficulty that arises in drawing the distinction is suggested by the qualification that Judge Chalmers annexes to his statement, namely, that "the insertion of mere terms of courtesy will not make the direction precative."[43] It is not easy to apply this rule, and perhaps it is impossible to reconcile the cases. An illustration of the difficulty is afforded by the following examples:—

1. "Mr. Nelson will much oblige Mr. Webb by paying W. J. Ruff, or order, twenty guineas on his account."[44]

2. "Mr. Little. Please let the bearer have seven pounds and place it to my account, and you will oblige your humble servant, R. Slackford."[45]

The request is in form precative in both cases, and it seems difficult to say from inspection of the documents, that one is any more imperative, or rather any less so, than the other. One is drawn to order, the other to bearer; but the judgments do not indicate that anything turns upon this difference. In one case the term "pay" is used, in the other the expression used is "let him have." The latter might seem to import a precative request rather than an order to pay, but in an Upper Canada case

[41] *Chalmers on Bills*, 6th Ed., p. 11.
[42] *The King* v. *Ellor*, 1 Leach C. L., 323 (1784).
[43] *Chalmers on Bills* 6th Ed., 11.
[44] *Ruff* v. *Webb*, 1 Esp., 129 (1794).
[45] *Little* v. *Slackford*, Moo. & M., 171 (1882).

(1858),[46] a document in the form, "Please let the bearer, William Tuke, have the amount of ten pounds and you will oblige me," was held to be an order for the payment of money and not a mere request. Each imports a request or direction to pay the money and, as already stated, the decisions do not lay any emphasis upon the difference between a bill payable to order and one drawn payable to bearer, though it may strike one that something could be made of this distinction where the cases are so close. In the second case, the objection was taken that the document was a bill of exchange and could not be read without a stamp, but Lord Tenterden ruled that a stamp was not necessary because the paper did not purport to be a demand made by a party having a right to call upon the other party to pay, the fair meaning of it being simply, "you will oblige me by doing it."

The earlier case was not decided upon the document alone. The court was assisted by the extrinsic evidence that Mr. Webb, the drawer, lived in the country and kept cash with Mr. Nelson, the drawee, in London, with which he paid all his bills in this manner, and that plaintiff, when he took the paper, was aware of this circumstance. The decision does not profess to proceed upon these grounds at all, but the evidence admitted could have had no relevancy except for the purpose of determining the nature of the direction and showing it to be "a demand made by a party having the right to call upon the other to pay."

In the light of these facts it was clearly a bill of exchange, although precative rather than imperative in its form, and was held to be such by Lord Kenyon.

See also cases in next following note.

Use of extrinsic evidence to interpret bill or note is not normal.—The difficulty of allowing extrinsic evidence to be given for such a purpose as that for which it was used in the cases referred to is very obvious. In "Gibson v. Minet,"[47] Lord Chief Baron Eyre said "Everything which is necessary to be known in order that it may be seen whether a writing is a bill of exchange and as

[46] *Reg. v. Tuke*, 17 U. C. Q. B., 296 (1858).
[47] 1. H. Bl., at p. 607 (1789).

such by the custom of merchants partakes of the nature of a specialty and creates a debt or duty by its own proper force, whether by the same custom it be assignable and how it shall be assigned, and whether it has in fact been assigned agreeably to the custom, appears at once by the bare inspection of the writing. * * * The value of the writing, the assignable quality of it, and the particular mode of assigning it are created and determined by the original frame and constitution of the instrument itself, and the party to whom such a bill of exchange is tendered has only to read it, need look no further and has nothing to do with any private history that may belong to it."

These observations were made in the course of a dissenting opinion, but they are cited by Professor Ames as a statement of the essential characteristic of negotiable paper.[48] It must, however, be confessed that the case referred to is not the only one in which the court was assisted by extrinsic evidence of this kind in determining whether the document was a bill of exchange or not. In "Norris v. Solomon,"[49] the defendant had purchased goods from the plaintiff, who sent him a bill, and at the foot of it had written: "Mr. Solomon. Please pay the above account to Messrs. Oliver & Son, 7 Laurence Lane, and oblige yours respectfully, R. Norris." This had all the formal requisites of a bill of exchange. It satisfied the definition in every particular, as qualified by Judge Chalmers' statement that the insertion of mere terms of courtesy will not make the direction precative and so prevent it from complying with that branch of the definition which requires that a bill of exchange should contain an order. It went further than was necessary in that it stood the test applied by Lord Tenterden in "Little v. Slackford."[50] It purported to be a demand made by a party having a right to call upon the other party to pay. Yet it was held by Maule, J., not to be a bill of exchange, apparently because, as evidence adduced for that purpose showed, the payees, Messrs. Oliver & Son, had no interest in the sum to be collected, but the account was delivered

[48] *Ames cases on B. & N.*, Vol. 1, p. 421.
[49] 2 Moo & R., 266 (1840).
[50] Ante, p 27.

to them merely as agents of and for the benefit of the plaintiff.

With this case may profitably be compared the case of "Hoyt v. Lynch."[51] The defendant had given a contract to Smith & Woglom to build a house for him, and Hoyt had tinned the roof for the contractors, to whom he rendered a bill for the amount of his account. On receiving the bill, they wrote thereunder:

"Mr. Lynch. Please pay the above bill, being the amount for tinning your houses on South Sixth Street, and charge the same to our account and much oblige,
Smith & Woglom."

This was properly held to be a bill of exchange, being clearly distinguishable from the case of Norris v. Solomon. Yet it is not certain that the latter case should be regarded as good authority. Professor Ames, referring to it, says: "Whether an instrument is a bill and whether the payee can maintain an action upon it are two distinct questions, the first of which must be answered by what appears on the face of the instrument, while, in determining the second, the character of the delivery must be considered. This distinction was overlooked in Norris v. Solomon, where, although the payee would not have succeeded in the action against the drawer because he simply gave it to him for the purpose of collecting it, the instrument contained all the formal requisites of a bill."[52]

We can do no better for the present than to leave these cases as they stand, with the comment that in so far as the decisions were influenced by evidence relating to the "private history" of the documents in suit, they proceeded on what may at least be considered as questionable ground.

Mere authority to pay is not an "order."—It is needless to add that words merely giving authority to the party addressed to pay the money will not be a compliance with the condition that the document should contain an order. For example: "We hereby authorize you to pay on our account to the order of W. G.", as to which Parke, B., in the course of the argument, said: "This

[51] 2 Sandf. (N. Y.) 328.
[52] 2 *Ames Cases on Bills*, (Index and Summary), p. 827.

is only an option to pay or not; therefore, this document is not a bill of exchange, but only a warranty in case the defendant paid." [53]

"Authorize and require," used in a document of a special character.—In the case of "Russell v. Powell,[54] the document had all the formal characteristics of a bill of exchange. An order had been made in a suit in Chancery of Powell v. Norwood that the defendants in that suit should retain two hundred and fifty pounds, being a part of the share of John Mynn in the residuary estate of a deceased person, to be paid to such person as John Mynn and George Powell should jointly direct. They drew up a document in the following terms, which was signed only by John Mynn, but by which the money was made payable to George Powell's order:

"To the executors of the late Thomas Harrison, deceased:

'Powell v. Norwood.'

"We do hereby authorize and require you to pay to Mr. George Powell, or his order, the sum of 250 pounds, being the amount directed by the order of 29th July last, to be paid to our order. We are, etc.,

Dec. 16th, 1842. John Mynn."

The question was whether this document could be received in evidence without a stamp. Rolfe, B., said that if Powell and Mynn had merely asked the executors to pay the amount, the request would not have required a stamp, as it would not have been an order delivered to the payee. "But here are parties upon whom a bill of exchange might be drawn and here are competent parties to draw it upon them. It seems to me to have all the characteristics of a bill of exchange." The majority of the court did not agree to this view of the matter and held for various reasons that it was not a bill of exchange. Parke, B., would not say what his opinion would have been "if the instrument had gone into hands of a third party for value." Platt, B., thought that the instrument was merely carrying out the order of the Vice-Chancellor and not an order capable of compelling payment.

[53] *Hamilton v. Spottiswood*, 4 Ex., at 209 (1849).
[54] 14 M. & W., 418 (1845).

Referring to this case in the later case of "Ellison v. Collingridge,[55] Cresswell, J., said: "The case of Russell v. Powell differs essentially from this. There a very special form of agreement was entered into; but the judgment of Rolfe, B., shows pretty strong reasons for construing the instrument to be a bill of exchange." In view of these observations and of the fact that the case is not referred to by Daniel, or Chalmers, or Maclaren, it might not be considered a very strong authority for holding that such a document would not be a bill of exchange, were it not for the objection which does not seem to have been suggested, but for which there would have been something to be said, that the money was intended to be payable out of a particular fund. See subsection 3, of section 17.

Order or promise must be unconditional and not in alternative.— The definition requires that the order should be unconditional and the definition of a promissory note requires that it should contain an unconditional promise. It will be convenient in discussing this requirement to refer to the cases arising on promissory notes as well as to those arising out of bills of exchange, as the principle applied is the same in both cases.

The oldest case that Professor Ames gives us on this subject in his selection of cases is that in which the promise was to "pay 72 pounds upon demand, or render the body of A. B. to the Fleet."[56] The case is not decided in terms upon the ground that the promise was not unconditional, but this ground underlies the decision of Eyre, J. "The statute," (of Anne), "intended only to make notes for money negotiable for the ease of merchants." This was not a note for money. It was just as much a promise to render the body as it was to pay the money. It was only a promise to pay money if the body should not be rendered to the fleet. It could be of no use in commerce, for no one who held it would ever be able to tell whether it was payable in money or not. In like manner, a few years later, was decided the case in the Modern Reports,[57] in which the document was:

[55] 9 C. B., 570 (1850).
[56] *Smith v. Boheme*, Gilbert, 93 (1714).
[57] *Appleby v. Biddolph*, 8 Mod., 363 (1717).

"I promise to pay T. M. so much money if my brother doth not pay it within such a time." So also where, although the note was not conditional in form it was in fact, seeing that it was a promissory note to pay money within so many days after the defendant should marry.[58] So also with the promise to pay four years after date, "if I am then living, otherwise this bill to be null and void."[59]

Note purporting to be given as collateral security is not unconditional.—In a case in Upper Canada, a promissory note contained the words, "this note to be held as collateral security," and it was held on the authority of English cases that it was not a good promissory note, Morrison, J., saying,[60] "One of the main requisites of a promissory note is that it contains a promise to pay unconditionally a sum certain, and if the note at the time of its making, whether on its face or by an endorsement, is made or rendered payable on certain conditions, that will deprive it of its character as a note. The words of Lord Denman[62] as to a similar document are quoted with approval: "The instrument is no promissory note. It gives notice on the face of it to all the world that the promise is only a conditional one."

The case of "Hall v. Merrick," (supra), was followed in "Sutherland v. Patterson,"[63] where a note was given in the usual form, but with the words added above the signature of the maker: "This note is given as collateral security for a guarantee of $5,000, given to John Sutherland by Alex. Sutherland."

"Cheque conditional deposit."—These words were written across the face of a cheque given as a deposit on an arrangement that the money was not to be paid unless the drawer secured a contract in connection with which the deposit was made. This was held not to be a cheque. It was not payable unconditionally.

[58] *Beardsley* v. *Baldwin*, 2 Stra., 1151 (1741).
[59] *Braham* v. *Bubb*, 1 Ames Cases on B. & N., 32 (1826).
[60] *Hall* v. *Merrick*, 40 U. C. Q. B., 566 (1877).
[62] *Robins* v. *May*, 11 A. & E., 213.
[63] 4 O. R., 565 (1884).

Condition that would be implied even if it were not expressed will not invalidate instrument as a bill or note.—The contingency or condition expressed in the bill or note may be simply the expression in the document of that which would be implied if it were not expressed and in that case it does not prevent the instrument from being a bill of exchange or promissory note. "Smilie v. Stevens,"[65] a Vermont case, is a good illustration of this. It was a certificate of deposit payable to James Smilie, or order, on demand, "on the return of this certificate and my guarantee of his note to his brother John, etc." Here there were two conditions on which the depositee undertook to pay the amount of the deposit, the return of the certificate and the surrender of the guarantee of James Smilie's note to his brother John. As to the first of these, Peck, J., said: "The fact that the instrument in question is made payable on the return of this certificate is not such a contingency as affects its negotiable character. It is an act to be done with the instrument itself contemporaneous with the payment and is no more than would be the implied duty of the holder of a negotiable note or bill in the absence of such stipulation, as it is the duty of the holder to deliver up a negotiable promissory note or bill on the payment of it by the maker as a voucher for his security, or show a sufficient excuse for not doing so." As to the other condition, however, the return of the guarantee, the case was entirely different. "This contingency is collateral to the instrument in question and depends on an act to be done by the payee and on the performance of which the liability of the defendant depends. * * * It is by the terms of the contract in question contingent whether the defendant ever would become liable upon it." The distinction is well drawn in this judgment, and well illustrated by this case between the expression in the document of that which would be implied even it were not expressed, and the insertion in it of a condition which would not be implied, and which prevents the instrument from being negotiable.

[64] Section 11 (2).
[65] 39 Vermont, 315 (1866).

Unconditional promise with option to promisee to accept alternative is good. Otherwise if the option is with the promisor.—There are two cases in Professor Ames' selection in which the obligation of the maker was fixed and definite, but an option was given on the face of the note, to the promisee, to take something else in lieu of the amount promised. In "Hodges v. Shuler,"[66] the promise was in substance as follows: "Four years from date, value received, Rutland & Burlington Railway Company promise to pay in Boston to Messrs. W. S. & D. W. Shuler, or order, $1,000.00 with interest, payable semi-annually as per interest warrants attached, or upon surrender of this note and warrants not used to the treasurer, he shall issue to the holder thereof ten shares in the capital stock of the company." This was held to be a promissory note. The promise to pay was unconditional. The promisee, if he chose to do so, could waive the payment and accept the substitute therefor; but the promisor could not elect to perform his obligation in any other way than by the payment of the money. This distinction explains the apparent inconsistency in the cases noted by Mr. Justice Maclaren, who gives as one of his illustrations the case where the promise was "to pay in cash, or goods, if the holder chooses to demand the latter,"[67] but seems to consider the cases on the following page in conflict with this illustration. There is, in fact, no conflict. In the case mentioned, which was "McDonnell v. Holgate,"[68] the promise was to pay in cash or in goods, if the holder should demand the latter, and the court held that this engagement was no more than a power given to the holder to convert a promissory note into an order for merchandise, if he saw fit to do so. The engagement of the promisor was absolute. In the cases which Mr. Justice Maclaren seems to refer to as if apparently conflicting, the promise was of an entirely different character. In one of the documents held not to be a note the promise was "to pay 25 pounds in cash or mortgage," at the election, of course, of the promisor.[69] In the next, it was to pay in cash at six months,

[66] 22 N. Y., 114 (1860).
[67] *Maclaren on B. & N.*, 3rd Ed., p. 39.
[68] 2 Rev. de Leg., 29 (1818).
[69] *Going v. Barwick*, 16 U. C. Q. B. 45 (1857).

if not previously paid, in lumber.[70] In the third, it was, at a time when Bank of England notes were not legal tender, "to pay in cash or Bank of England notes."[71] The promise was not in any of these cases an absolute promise to pay with an option given to the promisee to accept, if he chose, something in substitution. It was an obligation which the promisor could discharge in either one of two ways at his own option. As to a promise of the former kind, Wright, J., in the case already mentioned (Hodges v. Shuler, ante p. 34), said: "The instrument on which the action was brought has all the essential qualities of a promissory note. It is for the unconditional payment of a certain sum of money at a specified time to the payee's order. It is not an agreement in the alternative to pay in money or railroad stock and thus satisfy their promise in either of two specified ways. In such case the promise would have been in the alternative. It was an absolute and unconditional engagement to pay money on a day fixed and, although an election was given to the promisee, upon the surrender of the instrument six months before its maturity, to exchange it for stock, this did not alter its character, or make the promise in the alternative in the sense in which the word is used respecting promises to pay. The engagement of the railroad company was to pay the sum of $1,000.00 in four years from date, and this promise could only be fulfilled by the payment of the money at the day named."

This case was in the Court of Appeals, New York, and was followed two years later by "Hosstatter v. Wilson,"[72] in the Supreme Court of New York, in which the promise was "to pay to the order of M. W. Wilson, fifty-five dollars at my store, No. 134 4th Street (or in goods on demand), value received." Without the words "on demand," it would not have been clear that this was an option given to the holder, and possibly it would have been like the promise to pay in cash or mortgage, which was held bad.[73] With these words the promise was clearly unconditional, as in the earlier case, and Ingra-

[70] *Houlton v. Jones*, 19 U. C. Q. B., 617 (1860).
[71] *Exparte Imeson*, 2 Rose, 225 (1815).
[72] 36 *Barbour*, N. Y., 307 (1862).
[73] Ante, p. 34.

ham, P. J., although adverse to the plaintiff at the argument, said, in delivering the judgment of the court: "In the present case the debtor promises to pay the money. He has no election to do anything else. If the holder chooses he may surrender the note and receive the goods, but that rests entirely with himself, and no choice is left to the debtor."

Promise to pay as per agreement is good in the absence of proof of an agreement making the promise conditional.—Another case that should be mentioned where the promise was apparently conditional but was held not to be so in reality, is that of which "Jury v. Barker,"[76] is an illustration. The document ran: "I promise to pay J. C. Saunders, or his order, at three months after date, one hundred pounds as per memorandum of agreement." It was contended in this case that the addition of these words made the promise conditional, or at least that they might do so, and that the writing was at least ambiguous because the memorandum might be found to contain provisions that would make the promise valueless to the indorsees. Lord Campbell, C. J., however, said: "The note here is an absolute and unconditional promise as to the payer, the payee, the amount and the date. If the addition of the words in question make the promise conditional it is on the defendant to show that and he has not done so."

Writing includes printing, lithographing, etc., and is good in lead pencil.—The document must be "in writing," which term, as defined in the Interpretation Act,[77] includes words printed, painted, engraved, lithographed or otherwise traced or copied." An indorsement on a promissory note written with a pencil was held to be valid within the custom of merchants in "Geary v. Physic,"[78] in which case Abbot, C. J., said: "There is no authority for saying that where the law requires a contract to be in writing that writing must be in ink."

Writing cannot be varied by parol evidence.—The rule of evidence which prevents a contract in writing from

[76] El., Bl. & El., 459 (1858).
[77] R. S. C., cap. 1, sec. 7 (23).
[78] 5 B. & C., 234 (1826).

being varied by parol testimony applies to the contract embodied in a bill or note. That rule as stated in "Taylor on Evidence,"[79] is that "parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a valid written instrument." This is the general rule. In its application to bills and notes it has been decided, as Maclaren states,[80] and for which he cites a large number of cases, that "according to this rule the contracts of parties to bills of exchange and promissory notes as appearing on the face of the instrument, whether of drawer, acceptor, maker or indorser, cannot be varied by parol evidence. Thus in an action upon a bill or note it is not admissible to prove that at the time of making it was agreed verbally that the bill or note should be renewed or not paid at maturity, or that the instrument expressed to be payable at a certain time should be payable by instalments or in any other manner than expressed in the instrument, or that a note payable on demand should not be payable until the death of the maker, or that it should be only to secure the payment of interest during the life of the payee, or that an indorser at the time of indorsing had agreed to waive his right to have notice of dishonor."[81] See next following note.

Can indorser by parol waive his right to notice of dishonor?—The statement here made by Mr. Justice Maclaren that parol evidence cannot be given to show that an indorser at the time of indorsing had agreed to waive his right to have notice of dishonor, may be open to question. Mr. Daniel says[74] "It has also been said that it cannot be shown that the indorser agreed at the time of the indorsement to be absolutely liable without demand and notice, but we concur with the authorities which sustain his freedom to waive his right to demand and notice at any time." "Free v. Hawkins,"[75] is the case cited by Mr. Justice Maclaren for this doctrine. In Mr. Daniel's foot-note to the passage above quoted, he refers to this case as the one "which is quoted

[79] *Taylor on Evidence*, sec. 1132.
[80] *Maclaren on B. & N.*, 3rd Ed., p. 33.
[81] See, however, cases as to holding the drawer to be the party primarily liable etc., *post*.
[74] *Daniel on Neg. Inst.*, 5th Ed., p. 693.
[75] 4 *Taunt.*, 92 (1817).

for this doctrine, but is not clearly in support of it by any means." The reasoning of Dallas, J., seems to support the proposition in the text of Maclaren on Bills, rather than that of Mr. Daniel. The judgment is founded on the decision of Lord Ellenborough in Hoare v. Graham, which was to the effect that parol evidence could not be given of an agreement to renew. But such an agreement would be in direct contradiction of the express terms of the promise to pay. In the case of an agreement to waive notice of dishonor, as Mr. Daniel says, the indorser " merely relieves the indorsee of the ordinary duties of diligence; of the necessity of certain acts to be done in the future which only impliedly are required, and which cease to be exacted by diligence when waived in advance." It seems that this ought to be the better opinion.

Apparent exceptions to parol evidence rule.—It is no infringment of the rule to show that the date of a bill or note, or of an acceptance or any indorsement on a bill, as apparent on the instrument, was not the date of its actual issue, acceptance or indorsement. Section 29 suggests the inference that this may be proved. The actual date of delivery of an instrument is a substantive fact which may be proved as a matter of course. The same thing is true in respect to evidence adduced to show the character of the delivery. It is always a matter of course to show that a deed was delivered as an escrow, and in the same way it is provided by section 40, that a bill or note may be shown to have been delivered conditionally to take effect as such only upon the happening of a specified event or the fulfilment of a stipulated condition.

Evidence to impeach consideration or show fraud or other defence, may be given.—Evidence may be given to show that there was no consideration, although the document states on its face that value has been rereceived, or to impeach its validity by proving fraud, duress, undue influence, illegality or mistake; and evidence adduced to show that a bill or note has been discharged by payment, release or otherwise in no way touches the rule referred to. It does not in any way con-

tradict, vary, add to or subtract from the terms of the document.

Rationale of the application of the parol evidence rule to negotiable instruments.—Professor Wigmore discusses the subject of the last two paragraphs in his treatise on the law of evidence in section 2443 and following sections.[82] He distinguishes between the fixed or implied terms of a negotiable instrument and the variable or expressed terms, the former being those annexed by law without expression in the document, such as the rules of presentment and demand, of acceptance and dishonor of transfer of title and obligations by indorsement, of primary and secondary liability; the latter comprising such variant terms as person, amount, time, and perhaps place. "As regards the 'variable' or 'expressed' terms of the obligation in the document, no extrinsic agreement can be availed of to avoid their enforcement; but as regards the 'fixed' or 'implied' terms of the obligation, an extrinsic agreement can be availed of if the transaction in hand is such as a whole, that for one purpose of it the form of a negotiable instrument or some particular feature of it, would be essential or peculiarly convenient, while for another and separate part of the transaction a different contract would be feasible and consistent."

Same subject. Agreements affecting the express terms of the document.—Mr. Wigmore's discussion proceeds as follows:—

"(1) An extrinsic agreement as to the mode of payment must be by the foregoing test ineffective, since the parties have expressly dealt with those matters in the instrument; and although an agreement to concede a 'credit or 'consideration,' as offsetting the obligation of the instrument would be a separate transaction and therefore valid, yet the distinction between the two may sometimes be hard to draw.

"(2) An extrinsic agreement as to the 'time of payment' is for the same reason ineffectual, although an agreement of 'renewal,' which may practically be equiva-

[82] 4 *Wigmore on Evidence*, p. 3444.

lent is in theory an agreement for an independent transaction, and should be recognized.[a] An agreement subjecting the obligation of the instrument to any condition or contingency, whether in time or otherwise, is ineffective, because the terms of a negotiable instrument are expressly unconditional; if it be said that the law would not permit the condition to be inserted and that thus it must be extrinsic if at all, the answer is, (according to the canon above stated), that there would then have been no necessity for resorting to the form of a negotiable instrument."

Parol agreement to renew.—It is not easy to agree with the author in the opinion above expressed that an agreement to renew, if that is what is meant, should be recognized. The reasoning of Lord Ellenborough in "Hoare v. Graham,"[33] seems more in accordance with principle where he says "if the promise (to renew) is contemporaneous with the drawing of the bill the law will not enforce it. This would be incorporating with a written contract an incongruous parol condition which is contrary to principles." It was contended in "New London Credit Syndicate v. Neale,"[34] that the clause of the Bills of Exchange Act providing that as between the immediate parties * * the delivery may be shown to have been conditional or for a special purpose only (s. 40), had changed the law; but the court held that no change had been made in this respect. The contract imported by the bill is to pay it at maturity and an agreement to renew the bill is inconsistent with that contract."

Can an oral agreement to renew be set up as a counter-claim or cross-action brought thereon?—In one of the Gilbart lectures[1] Mr. Paget comments on a statement of Judge Chalmers which occurs at page 60 of the 6th edition. It is to the effect that "though the terms of a bill or note may not be contradicted by oral evidence, yet effect may be given to a collateral or prior oral agreement by cross-action or counter-claim." In support

[a] See comment in paragraph immediately following.
[33] 3 *Camp*, 57.
[34] 1898 2 Q. B., 487.
[1] 7 J. C. B., 242.

of this statement the author cites a statement of the law by Byles, J., in "Lindley v. Lacey,"[2] in which he says that "evidence may be given of an oral agreement which constitutes a condition on which the performance of the written agreement is to depend; and, if evidence may be given of an oral agreement which affects the performance of the written one, surely evidence may be given of a distinct oral agreement upon a matter on which the written contract is silent." The writer, (Mr. Paget,) says with perfect accuracy that "the first part of this citation from Byles, J., is bad law. "You cannot give evidence of an oral agreement which constitutes a condition on which the performance of the written contract is to depend. You can give oral evidence of a condition until the fulfilment of which the written contract is not to come into existence,—is to remain in embryo," &c. The statement of Judge Chalmers founded on this citation is also criticised and the writer concludes that "you cannot either by cross-action or counter-claim set up a prior or contemporaneous agreement which contradicts or varies the terms of the bill or note any more than you can set it up as a defence." "I do not believe," says the writer, "for a moment that any court would stultify itself by allowing a man to receive damages for breach of an oral agreement to renew a bill, and at the same time giving judgment against him on the bill on the ground that such oral agreement was not admissible in evidence as a defence." There can be no doubt that this is the correct view.

Mr. Wigmore's discussion resumed. Mr. Wigmore proceeds as follows:—

"(5) An agreement 'not to enforce' or 'sue upon' the instrument at all must be equally ineffective, the only doubt here arising from the necessity of distinguishing between this rule and another rule which concedes that a document intended merely as a friendly memorandum is without legal effect. On the other hand, an agreement by an 'accommodated party,' who appears on the face of the document as an obligee (e. g., the payee of a note), not to enforce it is of course effective. The distinction between the two is apparent from what has been already said." (referring to a previous section in which the author

[2] 34 L. J. C. P., at p. 9 (1884).

explains that the parties may wish to employ a negotiable instrument for the sake of some one or more specific attributes, but wish also to modify for their own case some of the other general consequences ordinarily implied as a part of the whole.) "In the former instance," (the agreement not to enforce, etc.), " there being no purpose of further negotiation of the obligation, the form of a negotiable instrument was wholly unnecessary, if the transaction be what the defendant claims, for a receipt or some other memorandum would have served equally well. But in the latter instance, the essential purpose being to negotiate the obligor's credit with other parties, a negotiable instrument was indispensable, and the transaction between the original parties was necessarily extrinsic to that instrument."

The author here criticizes the common explanation that the ground of the distinction here, that is the ground for giving effect to the defence that the bill was given for accommodation, is the necessity for avoiding circuity of action. He proceeds:—

" (4) An agreement between one co-maker and the payee to hold the former as surety only seems at first sight to be a mere condition qualifying the face of the instrument, and therefore ineffective; but, as in the case of accommodation paper, it may be that the negotiation of the instrument requires several parties having primary liability; hence the surety would have to appear as co-maker and not as a drawer, and the suretyship agreement would have to be extrinsic. Such an agreement is generally given effect." Thus in 'Leeds v. Lancashire,'[85] (1809), cited by the author, two signers of a promissory note were allowed as between the original parties to show that they signed merely as guarantors of the maker.

" (5) The question whether one who signs as 'agent' or 'president,' or 'guardian,' is personally liable, seems to be mainly a question of interpretation; for if no such word had been inserted the agreement would be ineffectual, as totally destroying the validity of the instrument; while if the signature had been of the principal, ward or company, 'by' the representative, the representative

[85] 2 *Camp.*, 205.

would not have been liable; the question thus becomes one of the construction of the document." [56]

Same subject. Agreements affecting the implied terms of the document.—The author from whom the foregoing paragraphs are taken says, (sec. 2443),[57] that "(1) An extrinsic agreement 'not to transfer' an instrument payable 'to order' cannot be effective, for the term 'to order' imports negotiability and there is no purpose that the term could serve if that element were discarded." American cases only are cited for this and they seem to be in conflict.

"(2) An extrinsic agreement between drawer and payee not to enforce the drawer's secondary liability on the bill, is plainly a discarding of the implied terms of a drawer's contract. Nevertheless, since there are several varieties of transactions for which such a form of draft would be peculiarly appropriate without involving the nominal drawer's liability—such as payment by seller's agent to his principal, or payment by a buyer's agent to the seller, or assignment of a claim without guarantee of the amount collectible—the agreement ought to be given effect." American cases only are cited and they seem to be in conflict.

"(3) For the same reason an extrinsic agreement between indorser and indorsee, cutting down the indorser's implied liability, either by denying recourse altogether or by placing both as co-sureties for a prior party or by limiting the liability to a warranty of genuineness of prior signatures, is effective, because the act of indorsement is necessary for the purpose of transferring title and yet the transfer of title may be only one feature of several transactions the remaining features of which cannot be embodied in the instrument without impairing its credit—such as the purchase of a claim on speculation as to the obligor's credit, or a transfer to an agent for collection. A distinction, however, is in some jurisdictions taken between an indorsement in full and an indorsement in blank; and in the latter case the agreement, either when denying recourse or when limiting the lia-

[56] See discussion of this topic under section 52.
[57] 4 *Wigmore on Evidence*, p. 3450.

bility to that of guarantee, is treated as invalid; but it is difficult to see what ground there is on principle for this distinction."

American cases only are cited for the distinction referred to. The principle is supported by "Pyke v. Street (1828)."[88] In "Denton v. Peters (1870),"[89] it was held that in order to constitute a valid indorsement as against the indorser there must be a writing of the name of the holder and a manual delivery by him of the bill with the intention not only to pass the property in it, but to guarantee the payment if the acceptor makes default, and evidence showing the absence of this intention is admissible under a traverse of the indorsement. This principle, of course, lets in evidence of a parol agreement varying the contract implied by law from the fact of indorsement; but if it goes to show that there was really no indorsement, which, of course, is what it amounts to as stated by this case, there is nothing contrary to the general principle in the admission of such evidence. The subject may be further considered under section 40 (b).

Mr. Wigmore proceeds as follows:—

"(4) The extrinsic agreement made with an anomalous indorser—i. e., one who, not being the maker, drawer, drawee, or payee, writes his name upon the back of a negotiable note before delivery to the payee, or before indorsement by him—should on the same principle be given effect; and this is generally conceded."

The consideration of this topic will be taken up under section 131.

Contemporaneous writing operative between immediate parties.—A contemporaneous writing may qualify and control the terms of the note or bill as between the parties to it, but can have no effect upon the position of a holder in due course, and, furthermore, the burden of proving that there was such an agreement or that such was its effect would be upon the party relying upon it, as shown by the case of "Jury v. Barker," and the observations of Campbell, J., already cited ante p. 36.

[88] M. & M., 226.
[89] L. R., 5 Q. B., 475.

May be addressed to drawer himself or to a fictitious person.—The definition requires that the bill, in order to be valid as such, should be an order in writing, addressed by one person to another, but section 26 shows that the other person to whom it is addressed may be the drawer himself, or may be a fictitious person. Strictly speaking, in such a case the bill is not addressed [illegible] to another. In such cases, as well as [illegible] who is a person not having c[illegible] holder may at his option, treat [illegible] bill of exchange or as a promissory [illegible]

Bill or note must be signed. Must it be subscribed?—It is provided by section 37 that a bill may be accepted before it has been signed by the drawer, but until the instrument is signed it is not a bill of exchange. Thus in "McCall v. Taylor,"[90] a document in the form of a bill of exchange was drawn upon Capt. W. Taylor of the ship "Jasper," for three hundred pounds, "payable to order," but was unsigned and it was held that the document was neither a bill nor a note. It will be seen, however, in the comments under section 37, that an unsigned document in the form of a bill of exchange has, after acceptance, been treated as a promissory note of the acceptor where there was a payee named in the body of the instrument.

This section does not state what constitutes a signing of the instrument. Presumably, the same distinction is to be noted here that was pointed out by Lord Westbury in "Caton v. Caton," L. R. 2 H. L., 142, between mere signing and subscription. The statute does not require that the name of the maker or drawer should be subscribed, but only that the document should be signed; see sections 17 and 176. Mr. Daniel, therefore, says that a document in form, "I, A. B., promise to pay," without any further signature, is as good a note if written by A. B. or his authorized agent as one in form, 'I promise to pay,' subscribed by A. B.; and in the same manner, 'I, A. B., request you to pay,' would be a good bill though not undersigned."[91] These statements of the law are supported by nisi prius decisions of Lord Kenyon;[92] but

[90] 34 L. J. C. P., 365 (1865).
[91] *Daniel on Neg. Inst*, 5th Ed., sec. 91.
[92] See references in *Saunderson v. Jackson*, 2 B. & P., 238.

those decisions, it must be conceded, did not relate to promissory notes or bills of exchange. What Mr. Benjamin characterized as the most full and authoritative exposition of the law on this subject is to be found in the case of "Caton v. Caton," by Lord Westbury, L. R. 2 H. L., 142. Referring to the Statute of Frauds under which the point arose in that case, he said: "It has been very correctly said that that statute requires a signing and not a subscribing. Hence, it has been deduced and I think correctly, that if the signature be in itself a sufficient signature, it matters not in what part of the instrument it is to be found. Now, what constitutes a sufficient signature has been described by different judges in different words. In the original case upon the subject, though not quite the original case, but the case most frequently referred to as of the earliest date, that of "Stokes v. Moore," (1 Cox 219), the language of the learned judge is that the signature must authenticate every part of the instrument; or again, that it must give authenticity to every part of the instrument. Probably the phrases 'authentic' and 'authenticity' are not quite felicitous, but their mean- is plainly this, that the signature must be so placed as to show that it was intended to relate and refer to and that it does in fact relate and refer to every part of the instrument. The language of Sir William Grant in 'Ogilvie v. Foljambe,' is, as his method was much more felicitous. He says it must govern every part of the instrument. It must show that every part of the instrument emanates from the individual so signing, and that the signature was intended to have that effect. It follows, therefore, that if a signature be found in an instrument incidentally only, or having relation and reference only to a portion of the instrument, the signature cannot have that legal effect and force which it must have in order to comply with the statute and to give authenticity to the whole of the memorandum."

A question can rarely arise in connection with a note or bill such as was raised in the case referred to. The instrument is usually so brief that any signature that it contains, even if contained in the body of the instrument, as in the anomalous cases given above as illustrations, and not subscribed in the usual way, will almost necessarily "govern" the whole instrument. What is

more important is to distinguish the cases where the name of the party placed in the body of the document by himself or by his authority operates as a signature, from cases such as "Hubert v. Treherne,"[93] where there was a lengthy agreement containing a number of articles and the document ended "as witness our hands." Maule, J., considered the cases decided under the Statute of Frauds as having stretched the law to prevent the injustice of enforcing the statute. "Before the statute no one could have entertained a doubt upon that point," (that this was not a signature).—"Since the statute the courts, anxious to relieve parties against injustice, have not unfrequently stretched the language of the act. But none of the cases hitherto decided under this statute have gone so far as the present. If a party writes, 'I, A. B., agree with C. D., etc.,' with no such conclusion as is found here, 'As witness our hands,' it may be that this is a sufficient signature within the statute to bind A. B. So where the seller's name appears in a bill of parcels which he fills up and delivers out as a complete and perfect contract, or where a party authorized so to do issues an instrument containing the printed name of the principal. But it would be going a great deal farther than any of the cases have hitherto gone, to hold that this was an agreement signed by the party to be charged. It is no more than if it had been said by A. B. that he would sign a particular paper." The addition of the words "as witness our hands," not followed by any subscription, showed that the document was incomplete and unsigned. If these words had not been there and the instrument had been delivered, the name of the party appearing in the body of the document and in such a way as in the language of Sir William Grant to govern the whole instrument, might have operated as a signature.

The name may be printed or lithographed, but as Mr. Daniel says,[94] in such cases it cannot prove itself and must be shown to have been adopted and used by the party as his signature. The signature does not "prove itself" in any case, not even where written by the hand of the drawer or maker, but what Mr. Daniel means is that in the case where the signature is printed or litho-

[93] 3 M. & G., 743.
[94] *Daniel on Neg. Inst.*, 5th Ed., sec. 74.

graphed it is necessary to show that the document was in fact put forward as a note or bill. In the case of the signature by the hand of the maker or drawer using his own name, proof of the handwriting would be proof of the "signing," but this kind of proof would be inapplicable to the case of a printed signature. In "Schneider v. Norris,"[95] the question was whether the vendor's name printed on a bill of parcels was a signature to a memorandum under the Statute of Frauds, and Parke, B., said, "I cannot but think that a construction which went the length of holding that in no case a printing or any other form of signature could be substituted in lieu of writing would be going a great way, considering how many instances may occur in which the parties contracting are unable to sign. If, indeed, this case had rested merely on the printed name unrecognized by and not brought home to the party as having been printed by him or by his authority, so that the printed name had been unappropriated to the particular contract, it might have afforded some doubt whether it would not be intrenching upon the statute to admit it. But here there is a signing by the party to be charged by words recognizing the printed name as much as if he had subscribed his mark to it, which is strictly the meaning of signing, and by that the party has incorporated and avowed the thing to be his and it is the same as if he had written the name Norris & Co. with his own hand."

Signature by initials or mark.—The signature may be by initials or by a mark. In the case cited as authority for the latter statement[96] the instrument was indorsed, "Ann Moore, her mark," and a witness was called who stated that he had frequently seen Ann Moore make her mark and so sign instruments, and he pointed out some peculiarity. Tindal, C J., after some hesitation, admitted the evidence as sufficient and the plaintiff had a verdict. A stronger case is the New York case of "Brown v. Butchers' and Drovers' Bank,"[97] where the figures 1, 2, 8, indorsed on the bill, no name being written, were found by the jury to have been made by Brown as a substitute

[95] 2 M. & Sel., 286.
[96] *George v. Surrey*, 1 Moo. & Mal., 516.
[97] 6 Hill, N Y., 443

for his proper name, and he was held liable as an indorser, although there was evidence to show that he could write. The court, per Nelson, C. J., sustained the ruling of the court below and said the cases showed that a person might become bound by any mark or designation he thought proper to adopt, provided it were used as a substitute for his name and he intended to bind himself.

A fixed or determinable future time; "on or before."—The editing committee of the Journal of the Canadian Bankers' Association say that a note or bill made payable on or before a given date would be good,[1a] for which they cite "De Braam v. Ford,"[2a] where the Court of Appeal held a bill of sale with these words valid. The decision turned on the question whether the bill of sale was in accordance with the statutory form, one of the characteristics of which, according to Lindley, J., was that there should be a "fixed and certain day of payment." The requirement of the Bills of Exchange Act is substantially the same.

Same subject; "two and a half months after date."—The committee mentioned in last paragraph found some difficulty in determining whether this would be a fixed or determinable future time. They say there have been no judicial decisions on the point. They suggest that the answer might depend on the time when the bill was drawn. A bill dated Jan. 10th, payable at three and one-half months, would be good and would become due April 25th, the half month of April being fifteen days. If it were dated 25th of January, it would be impossible to say what the half month would be. Would it be half the month of April or half the month of May?[3a]

Payment may depend on an event certain to happen though of uncertain date.—It will be seen that by section 24 post the fixed or determinable future time at which the bill is to be payable may be a time which can only be determined by the happening of an event in the future, provided the event is one which is certain to happen.

[1a] 7 J. C. B. 388.
[2a] 1900, 1 Ch., 142.
[3a] 6 J. C. B., 211; 7 J. C. B., 166

"A sum certain."—The bill must be for a sum certain, and sub-section 2 of the section under consideration, (sec. 17), enacts that the instrument will not be a bill of exchange if it requires anything to be done in addition to the payment of a sum certain in money. The same principle applies of course to a promissory note.* But the maxim "id certum est quod certum reddi potest" applies to the requirement that the bill must be for a sum certain, and if the whole amount can be made certain by mere calculation from what appears on the face of the paper there can be no objection made to it on the ground of uncertainty. Mr. Daniel cites a case from Texas where the note was held good which contained a promise to pay bearer a certain sum per acre for so many acres as a certain tract of land contained,—so soon as the number of acres was indorsed upon it."[18]

Draft drawn "with bank charges" not negotiable.—The editors of the Canadian Bankers' Journal say:[19] "We would not consider a draft drawn payable 'with bank charges' a bill of exchange. Sec." (28 d) " of the Bills of Exchange Act declares the sum payable by the bill to be 'a sum certain' if it is payable according to a rate of exchange to be ascertained as directed by the bill. This is the only provision in the act which could be looked to to support the proposition that a bill payable 'with bank charges' is for a sum certain and we do not think that it would come within this section." There can be little doubt as to the correctness of this opinion.

Addition of exchange.—It is provided by section 28 d. that the sum payable by a bill is a sum certain within the meaning of the act, although it is required to be paid according to an indicated rate of exchange or according to a rate of exchange to be ascertained as directed by the bill. See notes on sec. 28.

Cheque payable in exchange.—The editing committee of the Canadian Bankers' Journal were asked a question with reference to a cheque drawn in Canada on an Ameri-

* The subsection here referred to is discussed in a note at a later page.
[18] *Smith* v. *Clopton*, 4 Tex., 109
[19] 6 J. C. B., 98.

can bank "payable in New York exchange."[2a] They doubt if this is a cheque at all properly speaking, because "it is not an order for the payment of money, but an order for the delivery to the party named of a draft on New York." If the meaning of the document was that it was to be payable with exchange on New York it would, they say, be within the provision of the act, sec. 9, which corresponds with section 28 d of the act now in force.

Addition of interest.—By the section already mentioned it is provided that the sum is a sum certain although it is to be paid with interest. If the rate is not named in the bill it is the rate provided by law which governs and the sum is thus certain. This is contrary to the case in the Court of Session, noted in Mews' Annual Digest for 1900, column 27, where it is said that "an obligation to pay a capital sum on demand together with any interest that may accrue thereon is not a promissory note as, the rate of interest not being specified, the obligation is not for a sum certain as required by the Bills of Exchange Act, 1882."[3a] If in the case cited the rate was uncertain the document was not a promissory note, but it is not explained why the rate was not determined by the law. It would be so in Canada in the absence of some express agreement and the document would be a promissory note. Possibly, in the case noted there may have been some circumstance not indicated in the note of the case that made the amount payable uncertain.

The further consideration of the topics referred to in this and the next preceding note comes properly under section 28.

The bill or note must be payable in money.—The bill must be payable in money and the amount for which a promissory note is given must be payable in the same medium. In "Horne v. Redfearn,"[1] the defendant promised in this form: "Sir, I have received the sum of twenty pounds which I have borrowed of you, and I have to be accountable for the same with interest." This was held to be a mere agreement and not a promissory note.

[2a] 4 J. C. B., p. 311.
[3a] *Lamberton* v. *Aiken*, 2 F., 189 (1900).
[1] 4 *New Cases*, 433 (1838).

the fair and reasonable interpretation being simply that the promisor would give credit in account and pay the balance. It might be thought, at first blush, that this case was in conflict with the earlier case of "Morris v. Lee,"[2] where the promise was to be accountable to the plaintiff, "or order." But it is not necessarily so. The meaning of the words, "I will be accountable," is not necessarily the same when they stand alone as when followed by the words "or order," and the decision holding this to be a promissory not proceeded expressly on the ground that these words were in the document. "This is for value received, and he makes himself accountable to the order. A fourth or fifth indorsee can settle no account with him. Therefore we must take the word 'accountable' as much as if it had been 'pay' and the plaintiff must have judgment." Mr. Daniel seems to overlook this distinction when he says that "an instrument directing a certain person to be accountable to A. B. for a particular sum would be a good bill,"[3] unless there is a difference between a promise to be accountable to A. B. and a direction to the drawee to be accountable to him, for which there is no authority. The only authority cited for the statement of Daniel is "Morris v. Lee,"[4] where words expressly making the promise negotiable were used.

Promise "to be responsible for" a sum certain.—In "Babineau v. LaForest,"[11a] the defendant signed a document acknowledging receipt of $1,200 from the plaintiff "for which I am responsible with interest at the rate of seven per cent. per annum upon production of this receipt and after three months notice." The only fair question that could be made as to this was whether the promise to be responsible was equivalent to a promise to pay. Was it any more than the promise to be accountable which in "Horne v. Redfearn,"[12a] was held not to be a promissory note. There were no such words as "or order," which in "Morris v. Lee,"[13a] were held to make

[2] 1 Stra., 29 (1725).
[3] 1 *Daniel on Neg. Inst.*, 5th Ed., sec. 35.
[4] 1 Stra., 29 (1725).
[11a] 37 N. B. R., 156
[12a] 4 *New Cases* 433 (1838).
[13a] 1 Stra., 29 (1725).

the document a promissory note. The case of the Central Bank[14a] cited as authority was altogether different because in the document there in question there was an explicit promise to pay and in the case of "Richer v. Voyer" cited in the case last mentioned, besides the word payable, which is different from the word responsible, there were words "à l'ordre" which the Privy Council point out are the apt words to constitute a negotiable instrument transferable by indorsement. In view of these considerations and of the dissenting opinion of Gregory, J., it may be questioned whether the decision of the New Brunswick Supreme Court that the document was a promissory note should be implicitly followed. The subject may be further considered under section 176.[a]

Credit A. B. in cash may be good.—Much the same question arose on a bill of exchange in "Ellison v. Collingridge,"[5] where the order was from the managing director of a marine insurance company to the cashier as follows:

"£500.

"Fifty-three days after date credit Messrs. Plummer & Co., or order, with the sum of five hundred pounds claimed per Cleopatra in cash on account of this corporation.

Augustus Collingridge,

Managing Director."

In the course of the argument, Cresswell, J., said: "Who ever heard of a negotiable right to be credited in a book?" and in delivering judgment after argument, Wilde, C. J., said: "Nothing is to be inferred but that the sum therein mentioned is to be paid. As I understand the words 'credit in cash,' this is an order by one person on another to hold to the use or at the command of a third party a certain sum. That means to pay the money to him." The force of this decision does not seem to depend upon the use of the words of negotiation. Both Cresswell and Williams, JJ., treat the words "credit in cash" as being equivalent to the word pay.

[14a] 17 O. R., 574.

[a] The appeal from the decision of the Supreme Court of New Brunswick was dismissed by the Supreme Court of Canada (37 S. C. R., 521) without calling upon the Respondent's counsel, but no reasons are given for the judgment and there is nothing to show that the precedents were examined.

[5] 9 C. B., 570 (1850).

Promise to pay in bank notes good if they are legal tender.—A promise to pay in good East India bonds would clearly not be a promise to pay in money, but how would it be with a promise to pay in Bank of England notes? Daniel says that in England Bank of England notes were made legal tender, but nevertheless, a promise to pay in that medium was not considered a promissory note.[6] The cases that he cites from Ames for this proposition, or rather which Ames gives at the place cited, occurred in 1808, 1815 and 1817. The notes were not made legal tender until 1833. It can easily be understood that a promise to pay in Bank of England notes, before they were made legal tender, would not be a promise to pay in money; but nothing of this kind has been decided in England since these notes were made legal tender. There does, however, appear to have been such a decision in Canada. In "Gray v. Worden,"[7] the note was made in the United States payable in Canada bills, at Port Hope in Upper Canada, where these bills had been made legal tender for the payment of debts, and Wilson, J., in delivering the judgment of the court, said: "It may be that a person can make a bill payable in a particular coin, as in gold or silver, because they are respectively money and specie; but I think he cannot make it payable in Canada bills because they are not money or specie. They have no intrinsic value as coin has. They represent only and are the signs of value. Money itself is a commodity. It is not a sign. It is the thing signified." For this view of the matter McCulloch's Political Economy is cited: but a more appropriate source of authority for the determination of a legal question would be Lord Mansfield, who said in "Miller v. Race"[8]: "These notes are not like bills of exchange, mere securities or documents for debts, nor are they so esteemed, but are treated as money in the ordinary course and transaction of business by the general sense of mankind, and on payment of them when a receipt is required the receipts are always given as for money and not for securities."

It may be suggested that this reasoning ought to have made a promissory note good when payable in notes of

[6] 1 *Daniel on Neg. Inst.*, 5th Ed., Sec. 57.
[7] 29 U. C. Q. B., 353 (1870).
[8] 1 Burr., 452 (1758).

the Bank of England, even before those notes were made legal tender in the payment of debts. The principle has not been carried so far, but it is difficult to see why there should be any objection made to such a promise where the bills have been made legal tender and there can be no mistake made in placing in opposition to Mr. Justice Wilson's irrelevant political economy the statement of Professor Ames that the opinion expressed in "Gray v. Worden," that legal tender notes are not money, "however sound in political economy is unsound in law."

Confusing dicta on this subject discussed.—There is in fact a great deal of confusion of thought apparent in the decisions on this subject, and a great conflict in the authorities. In England there is a remarkable dearth of authority, and Judge Chalmers mentions only a single case on the point. The American cases are abundant but hopelessly in conflict. The drift of the better American cases is against the decision in "Gray v. Worden," and goes to show that the promise is good if it is a promise to pay in a medium of exchange which is legal tender in the place where the bill is payable.[8a] The dicta in the text books go very much beyond this. For example, Mr. Daniel says:[9] "It is not necessary that the money should be that current in the place of payment or where the bill is drawn. It may be in the money of any country whatever"; for which Chitty on Bills and Story on Bills are cited as authority. The terms used by Daniel are those of Chitty's statement. Story's is equally emphatic; "if it be payable in money, it is of no consequence in the currency or money of what country it is payable."[10] There is an obvious ambiguity in these statements. Take the case of a bill or note made in England payable in the United States for £100. In one sense this is payable in the money of England, and it is possibly in this sense that Chitty and Story intended their words to be taken.[a] But it is not really payable in the money of

[8a] See, however, note on p. 56

[9] 1 *Daniel on Neg. Inst.*, 5th Ed., sec. 58.

[10] *Story on Bills*, sec. 43.

[a] It seems clear that this is Story's meaning from the following: "It may be payable in coins such as guineas, ducats, Louis D'ors, doubloons, crowns or dollars, or in the known currency of a country as pounds sterling, livres tournoises, francs, florins etc, *for in all these cases the sum of money to be paid is fixed by the par of Exchange* or the known denomination of the currency with reference to the par. *Story on Bills*, p. 55 (1843 Ed.).

England unless that money is also made legal tender for the payment of debts in the United States. It is really payable in the money of the United States calculated at the rate of exchange current at the date on which the bill is payable. The statements of these authorities, taken in their literal sense are probably incorrect. The bill cannot be made payable in the money of any country whatever. It must be payable in legal tender of the place where it is made payable.* What these authors probably meant to say was that the amount to be paid could be stated according to the denominations used in any country whatever; but in so far as they or the cases founded upon them, or upon which they are founded, embody the proposition that a good promissory note can be made, the obligation of which can be discharged by the tender of that which is not legal tender at the place of payment,* they are unsound in principle and in conflict with the requirement that the note should be payable in money. There is probably no case which presents the true distinction in a more luminous manner than that of "Thompson v. Sloan."[11] The note in that case was made in the State of New York for the payment in that State of a sum specified "in Canadian money." The court held that this meant Canadian legal tender, and therefore that it was not good as promissory note, or if this view was not correct, then that parol evidence was admissible to show that the term used meant Canada bank bills, and in either case it was not payable in money. The following extracts are from the judgment of Cowen, J., in the Supreme Court of New York:—

"A promissory note must, in order to come within the statute, like a bill of exchange, be payable in money only, in current specie, or at least in what we can judicially notice as equivalent to money. Admitting that the note in question imports an obligation to pay in gold and silver current in Canada, I do not see on what principle we can pronounce it to be payable in money within the

* This is Mr. Ames' answer to the question here considered. Perhaps in view of the confusing nature of the discussions it is well not to be too dogmatic. In *Bull* v. *Kasson*, 123 U. S., 105 (1887), Mr. Justice Field said that "a negotiable bill must be payable in money, or whatever is current as such by the law of the country where the instrument is *drawn or payable*." The general subject is further discussed in the following [illegible].

[11] 23 *Wendell*, N. Y., 71 (1840).

meaning of the rule. It is not pretended that coins current in Canada are therefore so in this state. As gold and silver they might readily be received, and so might the coin of any foreign country, Germany or Russia for instance, but the creditor might, and in many cases, doubtless, would refuse to receive them because ignorant of their value. In law they are all collateral commodities like ingots or diamonds, which, though they might be received, and be in fact equivalent to money, are yet but goods and chattels. A note payable in either would, therefore, be no more negotiable than if it were payable in cattle or other specific articles. The fact of Canada coins being current here is not at any rate so notorious that we can judicially notice them as a universally customary medium of payment in this state, and, if not, they are no more a part of our currency than Pennslyvania bank bills. * * This view of the case is not incompatible with a bill or note payable in money of a foreign denomination or any other denomination being negotiable, for it can be paid in our own coin of equivalent value, to which it is always reduced by a verdict. A note payable in pounds, shillings and pence made in any country is but another mode of expressing the amount in dollars and cents and is so understood judicially. The course, therefore, in an action on such an instrument is to aver and prove the value of the sum expressed in our own tenderable coin. It is payable in no other. (Vide Bayley on Bills, 23 Am. Ed. of 1836, and the cases there cited), whereas on the note in question Canada money, a specific article, would be a lawful tender. Nor is it necessary to deny that, had this note been made, indorsed and payable in Canada it would have been payable in the current coin of the country where it was made. The objection is that the note was made indorsed and payable here in a foreign commodity, which the payee was entitled to demand specifically and to reject gold and silver current in the United States."

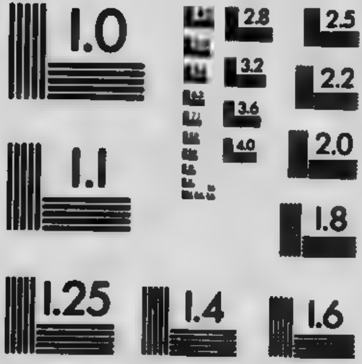
The conclusions arrived at by Professor Ames on this subject are as follows:—[12]

"A bill must be payable in money, i. e., in what is legal tender in payment of debts at the place of payment.[a]

[12] 2 *Ames Cases on B. & N.*, 828.
[a] See footnote p. 56.

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



Accordingly an instrument is not a bill which is payable in 'bank notes,' unless they are legal tender, or 'currency,'[b] 'current funds,' or 'current bank notes,' or 'foreign money,' e. g., a bill payable in New York in Canadian money.

" But the amount of a bill may be expressed in money of a foreign denomination if the bill is not payable in the foreign money; e. g., an English bill for one hundred pounds payable in the United States.

" If there are two or more kinds of legal tender at the place of payment a bill or note may be made payable in any one of them; e. g., in the United States a bill may be made payable in gold, silver or legal tender notes.

" The opinion expressed " (in " Gray v. Worden ") " that legal tender notes are not money, however sound in political economy, is unsound in law."

Bill payable in currency, etc. Canadian cases.—The Canadian cases on this subject cannot be said to yield very satisfactory results. In " Bettis v. Weller,"[4a] a sound decision was arrived at although based on the questionable case of " Gray v. Worden."[5a] It was to the effect that a note made in Cobourg, Upper Canada, to pay in Cobourg, two hundred dollars current funds of the United States of America, was not a promissory note, not being payable in money. It was followed in 1872 by " Greenwood v. Foley,"[6a] in which it was held that a note made and indorsed in Canada payable in New York for $581.40 American currency, was a good promissory note. This might well be if " American currency " meant that which was legal tender in the payment of debts in New York, and Hagarty, C. J., speaks of it as the money of the place of payment. Next came the case of " Third National Bank of Chicago v. Cosby et al,"[7a] the head-note of which is as follows: " Held that a promissory note made in Canada and payable in the United States and in the currency thereof, without the words, 'and not otherwise or elsewhere,' was a good promissory note

[b] The question here should turn on the meaning of the term " currency ". See next following note on Canadian cases.
[4a] 30 U. C. R., 23 (1870).
[5a] 29 U. C. R., 535.
[6a] 22 U. C. C. P., 353 (1872).
[7a] 43 U. C. Q. B., 58 (1878).

for that it was payable generally and might be sued on here. 'Bettis v. Weller' overruled and 'Greenwood v. Foley' followed." It is difficult to see why it was necessary to overrule "Bettis v. Weller" in order to follow "Greenwood v. Foley." Assuming "American currency" to be legal tender, those cases were both consistent with the principle which it is submitted should govern the question. But in the latter case case a difficulty was presented by the contention that under the law as it then stood the legal effect of the notes, in the absence of restrictive words as to the place of payment, was that they were payable generally and not exclusively in the foreign country and, being in the currency of a foreign country, they were not valid notes in this country. The court held that they were payable generally and that therefore the question had to be answered whether a promissory note made in Upper Canada payable generally and not exclusively in the United States and payable in American currency or lawful money of the United States was a good promissory note. "It now appears as a fact that the note is payable in money. But it is argued that as it is the money of a foreign country and as the note is in effect payable in Canada, the money not being the money of Canada, the instrument is not a good promissory note in Canada." The court meets this contention with the citation from Chitty already referred to that "the money may be the money of any country whatever," upon which citation they correctly say that the case of "St. Stephen's Branch R. W. Co. v. Black,"[98] was founded. In this case the Supreme Court of New Brunswick, Fisher, J., doubting if not dissenting,—and properly doubting or dissenting it is submitted,—held that a note made in New Brunswick and payable there in United States currency could be recovered on as a promissory note.

The reference to the Upper Canada cases would be incomplete if no mention were made of "Stephens v. Berry,"[99] in which the bill was payable in New York "with current funds," and Richards, C. J., said: "There was nothing said in the argument as to this bill being

[98] 13 N. B., 139 (1870).
[99] 15 U. C. C. P., 548.

payable in New York with current funds. If that means anything different from lawful money of the United States, then it may be a question if the instrument is a bill of exchange act at all." It is to be regretted that the question was not argued and decided on the principle in the direction of which Richards, C. J., was evidently heading.

In "Souther v. Wallace,"[10a] it was held by the Supreme Court of Nova Scotia that a note made payable in Boston in United States currency was a good note and that the term "currency" in the note must be held to mean United States currency the note being payable in Boston. This decision was affirmed by the Supreme Court of Canada.

The result seems to be that in Nova Scotia and, by the decision of the Supreme Court of Canada, for the whole Dominion, the law, contrary to one of Mr. Ames' propositions,—is that a note payable in the United States in American currency is a good promissory note being payable in money, but there is no decision which is necessarily opposed to Mr. Ames' proposition that the note must be payable in that which is legal tender at the place of payment, or to Mr. Justice Field's proposition that it must be payable in money or whatever is current "as such" by the law of the place where the instrument is drawn or payable. The Ontario and New Brunswick courts seem to have adopted the dictum of Chitty in the widest sense in which it can be understood and without reference to the distinction that has been suggested in the next preceding note, (ante p. 57).

Cheque "payable in exchange." See note, page 50.

Requirement or promise of additional act vitiates bill or note.—The oldest case in Professor Ames' collection is that of a promise to deliver up horses and a wharf and pay money at a particular day, which the court held could not be counted on as a note within the statute. As to this case, Parke, B., said, the case of "Martin v. Chantry,"[13] shows that a promise in writing to pay money and do any other thing is not a promissory note. To consti-

[10a] 16 S. C. C., 717 (1888).
[13] *Martin v. Chantry*, 2 Stra., 1271 (1748).

tute a promissory note the promise must be to pay a sum certain and nothing else.[14]

Mr. Justice Maclaren cites two American cases among his illustrations. In "Irvine v. Lowry,"[15] an order requiring payment of a certain sum "and to take up a note for the drawer" was held not to be a valid bill of exchange, and in "Marrett v. Equitable Ins. Co."[16] the principle was applied in the same way to an order for "$800 and such additional premiums as may be due on policy 218171." Several other illustrations are given in Maclaren on Bills,[17] in some of which the bill or note was bad because not wholly payable in money, in some because the amount was not certain or ascertainable with certainty, and in some of which the promise or requirement was to do something in addition to paying money. They do not seem to present any difficulty. The cases that chiefly call for discussion are those that arise in the application of the next following sub-section of the present section 17.

Innocuous addition to promise or order.—In "Kirkwood v. Smith et al,"[15a] Lord Russell of Killowen, C. . held that a document was not a promissory note because it contained a clause stating that "no time given to, or security taken from, or composition or arrangement entered into with either party hereto, shall prejudice the rights of the holder to proceed against any other party." His lordship thought it "safer to take the provisions of sub-section 3 by which 'a note is not invalid by reason only that it contains also a pl , of collateral security with authority to sell or dispc .nereof,' as importing that if the document contains something more than is there referred to it would not be valid as a promissory note." In a later case of "Kirkwood v. Carroll et al,"[16a] the same question precisely came before the Court of Appeal and Lord Halsbury, L. C., said: "The addition to this promissory note does not qualify it, and I doubt whether the addition is in any proper sense operative.

[14] *Follett v Moore*, 4 Exch., 416 (1849)
[15] 14 Peters, U S., 293 (1840).
[16] 54 Maine, 537 (1867).
[17] *Maclaren on Bills*, 3rd Ed , pp. 43, 44.
[15a] 1896, 1 Q. B., 582.
[16a] 1903, 1 K. B., 531.

The document contains a promise to pay a certain sum of money by certain instalments and it seems to me impossible to suggest that it is anything else but a promissory note within the meaning of the Bills of Exchange Act, 1882. The case of "Kirkwood v. Smith" was decided without reference to the other sections of that act and cannot any longer be regarded as an authority."

Pay and hold against me in our settlement.—These were the terms of the order in "Leonard v. Mason,"[16b] where the question was raised whether the document was a bill of exchange. The court referred to a previous case in which the drawees were required to pay a certain sum and to take up a note given by the drawer to a third person and it was held that this could not be a bill of exchange. Here it is to pay a note, which is referred to merely to ascertain the amount; and the retaining the note as a voucher is no more the performance of another act beside the payment of the money than retaining the order itself for the same purpose.

Lien note.—In the case of the "Dominion Bank v. Wiggins,"[16c] the question arose as to the negotiability of a lien note so called which was in this case an instrument in the form of a promissory note given for part of the price of an article with the added condition "that the title and right to the possession of the property for which this note is given shall remain" (in the vendors) "until this note is paid." Maclennan, J. A., held that this was not a promissory note or negotiable instrument. He thought the stipulation referred to was fatal to the instrument as a promissory note. "It imports that the money which is to be paid is the consideration for the sale of the property and that neither the title nor the right to possession was to pass until payment. If that is so it follows that the purchaser is not compellable to pay when the day of payment arrives unless at the same time he gets the property with a good title and the payment to be made is, therefore, not an absolute unconditional payment at all events, such as is required to constitute a good promissory note. It is in effect a conditional payment." This decision was not arrived at

[16b] 1 *Wendell*, N. Y., 522 (1828).
[16c] 21 O. A. R., 275.

without consultation with the other members of the court who agreed in the conclusion which Maclennan, J., here expressed.

The editing committee of the Canadian Bankers' Journal expressed the opinion that a lien note could be framed which would do all that was done by the lien note commonly in use[17a] and a correspondent suggested a form which he thought would be effective which was as follows:—[18a]

"Six months after date I promise to pay * * * or order at the * * * Bank, Winnipeg. * * * dollars value received. This note is given for a * * * reaper on which I hereby give a lien to the holder of this note from time to time as security for the payment of this note."

The committee express the opinion that this would be a negotiable promissory note giving the holder thereof all the rights and remedies usually possessed by the holder of a negotiable instrument. Although it is stated that the money to be paid is the consideration for the sale of the property, there is nothing importing that anything further is to be done by the vendor of the property in the way of making title or otherwise. On the contrary, the maker gives a lien to the holder of the note which would imply, if anything, that the sale to the maker was complete." They do not say that the lien given would afford a safe security as it would be void against creditors under the chattel mortgage act. They merely say that the note would be negotiable notwithstanding the provision for lien.

Order to pay out of particular fund not negotiable, but otherwise as to a reference to a fund from which to reimburse or a mere statement of a transaction or of account to be debited.

17. (3) An order to pay out of a particular fund is not unconditional within the meaning of this section: Provided that an unqualified order to pay, coupled with,—

(a) an indication of a particular fund out of which the drawee is to re-imburse himself, or a particular account to be debited with the amount; or

(b) a statement of the transaction which gives rise to the bill;

is unconditional. 53 V., c. 33, s. 3. [E. s 3.]

[17a] 2 J. C. B., 2.
[18a] 4 J. C. B., 95.

Order to pay out of drawer's growing subsistence bad. —In the old case of "Josselyn v. Lacier,"[18] the declaration was that Evans drew a bill upon Josselyn requiring him to pay Lacier seven pounds every month out of the growing subsistence of Evans. Some of the reasons given for holding this not to be a good bill of exchange are obsolete, but one remains good. There might never be any such fund out of which the bill could be paid, and therefore it was payable on a contingency. "If the party dies or his subsistence be taken away it is not to be paid." A little later came the case[19] in which the money was ordered to be paid out of the proceeds of the Devonshire Mines and Quarries, and the court was of opinion that this was "not a bill of exchange, but a bare appointment to pay money out of a particular fund, with a view to having it paid out of which fund the defendant probably drew the bill, and never designed that the bill should be paid absolutely and at all events, but only out of the particular monies mentioned."

Order to pay drawer's quarterly half pay by advance held good.—The cases in which the money is payable out of a particular fund must be distinguished from those in which the money is payable absolutely and a fund is simply mentioned from which the party who pays is to reimburse himself. This distinction is carefully drawn in the statute in the words of the sub-section under consideration. There is of course no doubt as to its reality. The statute only attempts to embody a principle for which there was abundant authority in the cases. But it is not always a simple matter to draw the line. Consider for a moment the case of "McLeod v. Snee."[20] As reported in Strange, this case is certainly difficult to distinguish from "Josselyn v. Lacier." The plaintiff declared that A. B. drew a bill dated May 25th, whereby he requested the defendant one month after date to pay to the plaintiff, or order, nine pounds ten, "as my quarterly half-pay to be due from 24th June to 27th September next, by advance." The report in Strange gives one very poor reason for distinguishing the cases, namely, that the

[18] 10 Mod. 294, 316 (1715).
[19] *Jenny et al. v. Herle.* 2 Lord Raymond, 1361 (1724).
[20] 2 Strange, 762 (1728).

quarterly half-pay was a certain fund, which the growing subsistence in the other case was not. We may be quite sure that no such reason would be accepted at this day for distinguishing the cases, and there is a better reason apparent when we look at the report in Lord Raymond, which is much more intelligible and satisfactory.[21] It is there made clear that the drawee of the bill was requested to advance on the 25th June the amount of the drawer's quarterly half pay, which would not be payable until three months thereafter, and it was, therefore, clearly a case in which the money was to be paid unconditionally, the reference to the half pay being simply an indication of the fund on account of which the money was to be advanced and from which the drawee should reimburse himself.

Mere statement of transaction does not invalidate bill, but what if the transaction so stated shows bill given for executory consideration?—After what has been said it is almost needless to emphasize the concluding portion of the sub-section in which it is enacted that the mere statement of the transaction which gives rise to the bill does not prevent it from being unconditional within the meaning of the section. There should not be much difficulty in applying this criterion and no difficulty is presented in the English decisions, except in one case. It is not certain that if the transaction out of which the bill arises is executory so that on the face of the bill it is expressed to be for an executory consideration the document would be good as a note or bill. In the first edition of Chalmers on Bills,[22] it was laid down distinctly that "a bill must not be expressed to given for an executory consideration," and the statement of the text was enforced by a note to the effect that "an executory (i. e., future) consideration expressed on the instrument would render it conditional and so invalid as a bill." This was based upon the decision of the Exchequer Court in "Drury v. Macaulay,"[23] where the document, a little abbreviated, was as follows:—

[21] *Macleod* v. *Snee*, 2 Lord Raymond, 1481.
[22] *Chalmers on Bills*, 1st Ed., 9, 16.
[23] 16 M. & W., 146 (1846).

"Drury v. Vaughan: In consideration of W. Drury not taking any further proceedings in the above actions, I do hereby undertake with the said W. Drury that I will pay unto the said W. Drury £3 5 s. every quarter from this day until the whole principal now due from Messrs. J. & T. Vaughan to W. Drury with lawful interest, is fully paid. This undertaking not to be a release of the note signed by J. & T. Vaughan to said W. Drury, but as an additional security for the amount now due on said note. Sgd., S. H. Macaulay."

A case was cited in the argument where a written promise made in consideration of forbearing an action for damages for injury sustained from the defendant's non-repair of a highway, for the repair of which he acknowledged his liability was held by Dewar, C. J., to be a note on the ground that the consideration was not executory but executed and completed. But the court in the case of "Drury v. Macaulay," held that the undertaking could not be regarded as a promissory note: Parke, B., on the ground that the instrument was to be deemed only an additional security for the balance due on the notes therein referred to; Alderson, B., on the ground that if the plaintiff did not forbear proceedings no money would be paid and it was therefore conditional.

The effect of the decision was to let in the evidence of the document which had been resisted by the under-sheriff on the ground that it was a promissory note and was not stamped. It is possible that the bias of the court in favor of doing substantial justice assisted it in distinguishing the case from "Shenton v. James,"[24] cited in the argument. However that may be, the case, although correctly decided in view of the nature of the transaction and document in question, cannot be relied upon for the principle that the mere fact of the consideration being executory prevents the document from being a promissory note. It was not because the consideration was executory, but because the court considered that the performance of the promise was conditional, that the instrument was held not to be a promissory note. But it does not necessarily follow that the promise is conditional because the consideration is executory. Although the

[24] 5 Q. B., 199 (1843).

consideration for a promissory note be in fact executory the promise may nevertheless be absolute. If, for instance, the note were payable at one month and the executory consideration were to be performed two months after date, it could not be pretended that the promise in the note was not absolute although the consideration was executory. Probably if both promises were to be performed on the same day and the note was not negotiable it might be contended that each was conditional on the performance of the other, and a fortiori if the executory consideration were to be performed before the maturity of the note. But in either case the fact of the note being payable to order would very fairly rebut the presumption that it was intended to be conditional on the performance of the consideration, as, by the very terms of the contract, it would be within the contemplation of the parties that the promise contained in the note might be exigible by one party and the performance of the consideration due from another. On the whole, it is difficult to see any good reason why the expression in the bill of an executory consideration should be held to invalidate it, unless, at all events, it could be read as the expression of a condition precedent to the obligation to pay the amount of the note. Probably it would be so read in such cases as "Drury v. Macaulay,"[25] where the note was not negotiable, and it would not do to suggest that such a note, not containing any words prohibiting negotiation, would now be negotiable. This would be begging the question, since we must first determine that it is a promissory note before we can invoke the provisions of the statute to make that negotiable which on the face of it is not so.

It would seem that Judge Chalmers, in his later editions, was not so certain about the matter as he was in his first. He now says: "The expression of an executory consideration on the face of a bill may perhaps make it conditional. But see sub-section 3."[26] This is the subsection which enacts that the statement of the transaction which gives rise to the bill does not make it conditional.

American cases.—There are several cases in Professor Ames' collection as to which it is not easy to say whether

[25] 16 M. & W., 146 (1846).
[26] *Chalmers on Bills*, 6th Ed., p. 11.

they would be regarded as law or not in an English or Canadian court. Their effect is summarized by Mr. Ames as follows:[26a]—An agreement relating to the bill or note itself and annexed to it as an incident, although not in itself negotiable, will not destroy the negotiability of the bill or note, e. g., a promise to pay any deficiency arising upon the sale of property pledged as security for the payment of the bill or note ("Arnold v. Rock River R. R."[27]), * * * or a promise to pay attorney fees and costs of collection if the bill or note is not paid at maturity. "Sperry v. Hoar,"[28] * * * If an agreement affixed as an incident to a note will not destroy its negotiability, a fortiori, a waiver of legal defences can have no such effect, e. g., "without defalcation or discount," or "waiving the right of appeal and of all valuation, appraisement, stay and exemption laws," "Zimmerman v. Anderson,"[29] nor the insertion of a warrant of attorney to confess judgment, "Sperry v. Hoar." Mr. Ames notes that "Overton v. Tylor,"[30] a Pennsylvania case, is opposed to this ruling; but he questions the soundness of of this Pennsylvania ruling and it was also questioned in the later Pennsylvania case of "Zimmerman v. Anderson," already cited but was not in this case overruled. It was distinguished. It is in the case of "Overton v. Tyler" that Gibson, C. J., uses the much quoted expression that "a negotiable bill or note is 'a courier without luggage.' It is a requisite that it be framed in the fewest possible words, and those importing the most certain and precise contract." In the later case, the note contained the words, "waiving the right of appeal and of all valuation, appraisement, stay and exemption laws," and Read, J., said, referring to these words, "they do not contain any condition or contingency, but after the note falls due and is unpaid and the maker is sued, they facilitate the collection by waiving certain rights which he might exercise to delay or impede it. Instead of clogging its negotiability, it adds to it, and gives additional value to the note." The decision is based on the English authority of

[26a] 2 *Ames cases on B. & N.*, 829.
[27] 5 Duer, 207 (1856).
[28] 32 Iowa, 184 (1871).
[29] 67 Penn., 420 (1871).
[30] 3 Barr, 346 (1846).

"Fancourt v. Thorne,"[31] on which and the earlier case of "Wise v. Charlton,"[32] sub-section 3 of section 176 is founded. In these cases, however, the note contained a mere statement of the fact that collateral security had been deposited, describing the nature of the security.

The question may be further considered under section 176.

Bill distinguished from mere equitable assignment.—One of the cases to which Judge Chalmers refers in this connection is that of "Munger v. Shannon."[33] In this case the document was in the following form: "Mr. Harrison Shannon. You will please pay to Messrs. Wilkin & Hair the amount of a note for $2,000, dated December 31st, 1868, and deduct the same from my share of the profits of our partnership business in malting. Note made by myself as principal to the order of myself and indorsed by Nathan Randall and Herrick Munger. L. A. Gulick, per E. Gulick, January 26th, 1869 The complainant alleged that this bill had been transferred to said Wilkin & Hair and afterwards was accepted by the defendant in these words: "Accepted February 6th, 1869. H. Shannon." Taking the transaction as a whole, the court held that this was merely an equitable assignment of the drawer's share of the profits of the business and not a bill of exchange payable at all events with a mere direction to the drawee to reimburse himself out of the profits. The difficulty of determining the point is admitted and it is said that "the cases, which are numerous, do not appear to proceed on any very well defined distinction." The direction in the case at bar was held to be equivalent to an order to pay out of the profits. "Pay and deduct," it was held, was equivalent to "pay on deducting," or "pay by deducting," and if the document meant this, it certainly was not a bill of exchange. The document contained no words making it negotiable. Had it contained such words, there would have been room for a contention similar to that by which the case of "Morris v. Lee" is distinguishable from "Horne v. Redfearn" (ante p. 51.) The direction is absolute in form and the drawee, by his acceptance, might well be assumed

[31] 9 Q. B., 312 (1846).
[32] 4 Q. B., 786 (1836).
[33] 61 N. Y., 251 (1874).

in the case supposed to have undertaken an absolute engagement to the holder and accepted the risk of reimbursing himself from the profits. In a Wisconsin case to which Judge Chalmers refers,[34] A. and B. who were cultivating on shares the farm of C. and D., gave an order to E. on C. and D. to pay a sum of money to E., "and take the same out of our share of the grain," referring to grain raised by A. and B. on the farm in question. C. and D. wrote, "order accepted," on the back of the instrument and signed their firm name. It was held that this was a bill of exchange and not an order payable out of a particular fund, or conditional on there being such a fund. "Munger v. Shannon" is distinguished on the ground that there the fund was in the hands and under the joint control of the drawer and drawee as co-partners and the order was drawn upon the drawee's share of the profits of the partnership business, which could not be ascertained without accounting and settlement.[35] Of course it is obvious that the drawee could pay the amount of the bill without an accounting and the whole question was, or should have been, whether this was the intention or whether the payment was to be contingent on there being profits. The distinction that was made use of in "Munger v. Shannon," to dispose of the authority of "Leonard v. Mason,"[36] seems equally unsatisfactory. Here the drawer wrote under a promissory note a direction addressed to "Levi Mason, Esq. Please pay the above and hold it against me in our settlement. N. Leonard," and it was held that this was a good bill of exchange. The court deciding "Munger v. Shannon," distinguished this case by saying that there was here no independent act to be performed other than paying the note. In "Munger v. Shannon," there were two wholly distinct acts,—pay the amount and deduct from the profits, and it was held for this reason not to be a bill of exchange. In "Corbett v. Clark" (supra), there were in the same sense two wholly distinct acts to be performed,—pay the amount and take the same out of our share of grain,—and it was held to be a good bill of exchange. Such distinctions seem somewhat artificial

[34] *Corbett* v. *Clark*, 30 Am. R., 763 (1878).
[35] 30 Am. R., at p. 769 (1878).
[36] 1 *Wendell*, N. Y., 522 (1828).

and irrelevant, and do not throw any light on the real question, which is simply a question as to the construction of the document, to be answered by reference to its terms and on principles which have been sufficiently indicated in the course of this discussion.

Happening of event does not cure defect of bill payable on contingency.

18. **An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect. 53 V., c. 33, s. 11 (2). [E. s. 11.]**

Bill conditional in its inception not validated by the happening of the event.—The first part of this section is simply a repetition of what is already stated in the definition of a bill of exchange. An instrument is not an unconditional order for the payment of money as required by the definition if the money is only payable upon a contingency. The words are doubtless repeated solely for the sake of the additional statement that the happening of the event does not cure the defect. If the bill was not good as such in its inception it is not made good by the contingency being afterwards reduced to a certainty. This was decided in an early case of "Kingston Long,"[37] in which the condition was that of compliance with the terms mentioned in certain letters written by the drawer. The court decided that the order was no bill until after such compliance and if it were not a bill when drawn it could not afterwards become one. The principle of this decision is embodied in this section of the act.

Bill may be made payable on a contingency by the acceptance.—It will be seen that by section 38 an acceptance may be made which will render the bill payable on a contingency. This, however, is a qualified acceptance. See comments under section 38.

Bill may be addressed to two or more drawees, but not in alternative or in succession.

(2) A bill may be addressed to two or more drawees, whether they are partners or not; but an order addressed to two drawees in the alternative, or to two or more drawees in succession is not a bill of exchange. 53 V., c. 33, ss. 6 (2). [E. s. 6 (2).]

[37] 1 *Ames cases on B. & N.*, 31 (1751).

Cross reference. See as to acceptance by one or more of the drawees, but not all of them, sec. 38 (2 d.)

Case of need.—Notwithstanding this provision the drawer may insert the name of a person to whom the holder may resort in case of need, that is in the event of the bill being dishonoured by the drawee. Such person is called the referee in case of need, and it is in the option of the holder to resort to this referee or not as he sees fit. See section 33.

Bill may be payable to or to order of drawer or drawee.

19. A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee.

Or to two or more payees jointly or in alternative or to one or more of two or several.

(2) A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees.

Or to holder of office for time being.

(3) A bill may be made payable to the holder of an office for the time being. 53 V., c. 33, ss. 5 and 7. [E. ss. 5 and 7.]

Bill payable to order of drawer.—The form of instrument first mentioned in the section has been long in use and is frequently adopted. So says Mr. Justice Maclaren.[38] The latter part of sub-section 1 seems to have changed the law. Before it was enacted an order addressed to the payee was not a bill of exchange at all. In "Reg. v. Bartlett,"[39] the prisoner was indicted for forging and uttering a bill of exchange and the acceptance of a bill of exchange. The document produced was in the form of an order addressed to G. Peckford, thus: "Please pay to your order the sum of forty-seven pounds value received," signed by J. Bishop and accepted by G. Peckford. Eskine, J., thought it too clear a case to reserve it for the consideration of the judges that this was not a bill of exchange, and Professor Ames says distinctly on authority of this case and two others in which the instruments were in the form of promissory notes payable to the order of the maker, that an instrument in which the

[38] *Maclaren on Bills*, 3rd Ed , p. 51.
[39] Moo. & R., 362, (1841).

ostensible payee is the same person as the acceptor or maker is not a bill or note, but such an instrument may be made a valid bill or note by indorsement.[40] It is also obvious that, although since the passing of the act such a document as the latter part of sub-section 1 describes must be considered a bill of exchange, it cannot be enforced until the drawee has indorsed it away.

Cheque payable to "self"; "bearer" struck out.—The editors of the Canadian Bankers' Journal discuss the the case of a cheque drawn by John Smith, payable to self, the word "bearer" being struck out, the cheque being otherwise in the common form. They answer[40a] that the cheque must be regarded as payable to John Smith or order. This follows from the section of the act. It is simply the case of a cheque payable to a particular person, with no prohibitive words, section 22.

Bill payable to holder of office or to payees alternatively.—In one of the cases before the act was passed the promise was to pay the secretary for the time being of the Indian Laudable Assurance Association.[41] This meant one of two things, either to pay the secretary if he continued to be secretary when the note came due, in which case the promise was contingent, or to pay the person who should be secretary when then note became due, in which case the payee was uncertain. In either case the note was bad and was held so to be. An ingenious and plausible method was adopted by Lord Cockburn to get around the authority of this case in "Holmes v. Jacques,"[42] which need not be referred to here, as the act has removed the difficulty by the provisions of this subsection which was introduced for that purpose. It was also objectionable before the act was passed to make the bill payable in the alternative to one of two or one or more of several payees. As was said by Abbot, C. J., "if a note be made payable to one or the other of two persons it is payable to either of them only on the contin-

[40] 2 *Ames cases on B. & N.*, 832.
[40a] 6 J. C. B., 209.
[41] *Cowie* v. *Sterling*, 6 El. & Bl., 333 (1856).
[42] L. R., 1 Q. B., 376 (1866).

gency of its not having been paid to the other and it is not a good promissory note within the statute." [43]

Anomalies not dealt with by the act.—A number of cases of irregularity and informality are covered by the act in the foregoing and other sections, and in the same connection provisions are contained declaring certain formalities usually complied with to be unnecessary to the validity of the instrument. No good purpose would be served by distinguishing those provisions which merely declare the law from those which amend it. But there are several cases of irregularity and informality not referred to by the act and the consequences of which are not defined by the act. These will be considered in the following notes.

Acceptance of bill of which there is no drawer.—In "McCall v. Taylor,"[44] the plaintiff had supplied goods to the ship "Jasper," and the ship's broker gave him an acceptance signed by the captain. It had no drawer's name and was undated, but was otherwise perfectly regular and was in the form of a draft to the drawer's own order, thus:

Four months after date pay to my order £300. Value received.

To Captain W. Taylor,
Ship "Jasper."

Across the face was written, "Accepted, W. Taylor."

This was held to be neither a bill of exchange nor a promissory note, but merely an inchoate document. If the goods were supplied as necessaries for the ship and the captain accepted for that reason it would have been a good bill of exchange if signed, and any bona fide holder could fill in his own name as drawer; but the court had to look at the document as it was and not as it might have been made. If the document had contained the name of a payee there is authority for saying that, although it could not be a bill of exchange it might have been treated after acceptance as a promissory note. In the Scotch case of "Drummond v. Drummond,"[45] the

[43] *Blanckenhagen* v. *Blundell*, 2 B. & Ald., 417, (1819).
[44] 34 L. J. Rep., C. P., 365, (1865).
[45] 1 *Ames cases on B. & N.*, 83; 3 *Morrison's Dic. of Dec.*, 1445

instrument was similar to that in "McCall v. Taylor."[46] It was in the form of a bill of exchange drawn in favor of Ann Drummond, or order. There was no drawer, but it had been accepted by James Drummond and the Court of Session held that as the creditor's name was inserted in the body of the bill and thus there occurred all the requisites of a promissory note, the objection must be repelled. There is no English case precisely similar, but Professor Ames considers this case good authority for the proposition that "an acceptance written upon an unsigned promissory note or bill is a note."[47] Of course he means that it is a note when there is a payee named in the body of it and not as in the case of "McCall v. Taylor," where there was no payee named. Mr. Daniel seems to doubt the validity of this proposition. Referring to the Scotch case he says: "In Scotland where J. D. accepted a paper drawn on him payable to the order of A. D., but there was no subscription of the drawer's name, it was considered to contain all the essential elements of a promissory note. But such an instrument has been more properly regarded as inchoate, and though capable of being completed, in its inchoate condition neither a bill nor a note."

Mr. Daniel is probably wrong about this and Mr. Ames right. Whether there is English authority for the proposition as applied to an irregular bill of exchange or not may be debateable. There can be no doubt as to a promissory note. In "Block v. Bell,"[48] there was a document in the form of a promissory note drawn in favor of A. B., or bearer, addressed as a bill of exchange would be to J. Bell and accepted by J. Bell as it it were a bill of exchange. Lord Lyndhurst, C. B., held that this amounted to a promissory note, the instrument containing a promise to pay and the signature of the defendant, although in terms an acceptance, acting as an adoption of that promise by him. This, it might be suggested, is rather the case of a promissory note signed in an irregular and unusual manner than a bill of exchange lacking a drawer and converted into a promissory note by the acceptance of the drawee. There is no essen-

[46] 34 L. J. C. P., 365.
[47] 2 *Ames cases on B. & N.*, p. 827.
[48] 1 Moo. & R., 149 (1831).

tial difference, however, between the cases. The court in both cases alike collects from the face of the document, as it presents itself, the statement in writing of a promise by the person signing as acceptor to the person named in the body of the document as payee.

In the case of "Stoessiger v. E. Railway Co.,"[49] there was no payee named, that is, it was payable "to my order," but there was no drawer, and although there was an acceptance written on the bill, as there was no drawer it was held that it was not a bill, order, note or security for payment of money nor writing of any value.

Case where there is a drawer but no drawee.—Cases have occurred where there was a drawer but no drawee. In "Forward v. Thompson,"[51] an Upper Canada case, the bill was perfect and regular in every respect excepting that there was no drawee named. Draper, C. J., said it could not be a bill of exchange because there was no drawee, and could not be a promissory note because there was no promise. The drawer did not in this case, as the acceptor in the other cases, intend to become a promisor, and hence it could not be a promissory note. But if, although the document was not addressed to anybody, there had been an acceptor, the intention would have been manifest on the part of such acceptor to become a promisor to the person named in the bill, and the only difficulty would be to determine whether his promise should be regarded as that of a promisor in a bill of exchange or in a promissory note. Looked at either way he would be incurring a primary liability to the payee, but if it could be regarded as a bill of exchange the holder could, on the failure of the acceptor to pay, have recourse to the drawer. In "Peto v. Reynolds,"[52] Alfred Righton had purchased a vessel for his principal Samuel Reynolds from the plaintiff for which he paid £100 in cash and drew a bill for the balance, not addressed to anybody, but which he himself accepted in the name of his principal Samuel Reynolds. Assuming the authority of Righton to accept in the name of Reynolds,—in other words taking this as

[49] 3 El. & Bl., 549 (1854).
[50] See, however, *Daniel on Neg. Inst.*, 5th Ed., p. 117, note 84.
[51] 12 U. C. Q. B., 103 (1854).
[52] 9 Exch., 410 (1854).

a bill drawn by Righton, addressed to nobody but accepted by Reynolds, this was the same case as "Forward v. Thomson,"[53] with the additional fact of the acceptance, which had not occurred in that case. Parke, B., expressed the strong opinion that this could not be a bill of exchange because there was no drawee, and Martin, B., said, "with respect to the matter of law, if it were necessary to express a decided opinion, I should concur with my brothers Parke and Alderson. It seems to me that it is absolutely essential to the validity of a bill of exchange that it should have a drawer and drawee." But, while all agreed in holding it not to be a bill of exchange for this reason, it was held by the three judges named, Pollock, C. B., expressing no opinion, that if Righton had authority to sign the acceptance for Reynolds it would be good as a promissory note; and this must be considered as a decision of the court because a new trial was granted for the purpose of clearing up the question of fact as to Righton's authority to sign the acceptance.

A curious case follows which turns out to be in effect the same case as "Peto v. Reynolds." Ann Langstaff owed Mrs. Emma Fielder rent and signed a paper in the form of a bill of exchange payable to Mrs. Fielder's order for the amount. She signed it as a drawer but addressed it to Mrs. Fielder, and it was accepted by J. Marshall, the defendant, whom Mrs. Fielder sued on his acceptance The court treated the address in the margin, not as an address to a drawee in a bill of exchange, but as a mere repetition of the name of the payee in the body of the document. Reading it in this way there was no drawee. The four judges agreed in holding the defendant liable, the Chief Justice making no reference to the question whether he was liable on a bill or note, but three of them held that it was a promissory note and Williams, J., said: "Without going into the question whether the instrument may be regarded as a bill of exchange—which the case of 'Peto v. Reynolds,' 9 Exch., 410, seems to negative —I am clearly of opinion that the plaintiff is entitled to recover on the footing of its being a promissory note."[54]

[53] Ante, p. 76.
[54] *Fielder v. Marshall*, 9 C B N S., 606, (1861).

Ambiguous instrument. Promissory note with address in margin as if to a drawee.—In "Edis v. Bury,"[55] the instrument was in the form of a promissory note to the order of the maker indorsed in blank. It was addressed in the margin, "J. B. Grutherot, 55 Montague Place, Bedford Square," and Grutherot had written his name across it. It was given in evidence by the defendant in answer to a claim for the price of some sheep. The defendant contended that the document was a bill of exchange on which he was liable only as a drawer and that as he had not received notice of dishonour it operated as a payment of the debt. The court held the defendant liable, three of the judges ruling that it was a promissory note. Bayley, J., held that it was ambiguous and might be treated as either a bill or a note, and Lord Tenterden, pointing out the anomalous and ambiguous character of the document, said: "It is an instrument, therefore, of an ambiguous nature, and I think that where a party issues an instrument of an ambiguous nature the law ought to allow the holder at his option to treat it either as a promissory note or a bill of exchange. That being so, I think it was competent to the plaintiff in this case to consider this as a promissory note; and if so the notice of the dishonour was unnecessary."

The case of "Lloyd v. Oliver"[56] was very similar. It was in form a promissory note by Henry Oliver to the plaintiff, but was addressed in the margin to the defendant, John E. Oliver, Birmingham, and was accepted by him. Lord Campbell thought the instrument, even before acceptance, might be treated as a bill of exchange as against Henry Oliver: "As against the defendant it is clearly a bill of exchange. The words, 'I promise to pay,' need not be rejected. They are to be construed as an expression of what otherwise would be implied, namely, that the maker will pay if the acceptor do not. The instrument is ambiguous and might, no doubt, be treated as a promissory note. This is the effect of the decision in Edis v. Bury."

[55] 6 B & C., 433, (1827).
[56] 18 Q. B., 471 (1852).

Drawee must be named or clearly indicated.

20. The drawee must be named or otherwise indicated in a bill with reasonable certainty. 53 V., c. 33, s. 6. [E. s. 6.]

Cases distinguished.—The cases prior to the Bills of Exchange Act established that if there was no drawee the document was not a bill of exchange. Mr. Justice Maclaren in his comments under this section asks the question: "If not addressed to any drawee, but accepted, is it a bill of exchange?" and refers to "Peto v. Reynolds,"[57] (see 9 Exch., 410.) We have seen that the principle deducible from this case is that a document so dealt with becomes the promissory note of the person so accepting, and Professor Ames says distinctly that an order which is not addressed to any person cannot be a bill.[59] But considerable latitude has been allowed in the manner in which the drawee is indicated. Strictly speaking, there should be a drawee indicated as such by the bill being addressed to him, but in one of the earlier cases the bill, while in the usual form in every other respect, had the following words in place of the address to the drawee: "At Messrs John Morson & Co."[58] This was not, properly speaking, a bill addressed to John Morson & Co., but it was fairly inferable that the drawer had funds there and that his purpose was to draw on them. Lord Ellenborough, accordingly, held that this was properly declared on as a bill of exchange and that Morson & Co. might be considered as the drawees. This case was followed, or rather improved upon, in "Gray v. Milner,"[60] where the bill was not in fact addressed to anyone, but after the signature of the drawer followed the words: "Payable at No. 1 Wilmot Street, opposite "The Lamb," Bethnal Green, London." It was accepted by the defendant and had been indorsed to plaintiff. Dallas, C. J., delivering the judgment of the court, said that this "was clearly a bill of exchange and properly declared on as such. It is not necessary that the name of the party who afterwards accepted the bill should have been inserted, it being directed to a particular place which could only

[57] *Maclaren on Bills*, 3rd Ed., 53.
[58] *Shuttleworth v. Stephens*, 1 Camp., 407 (1808).
[59] 2 *Ames cases on Bills*, 832.
[60] 8 Taunt., 739 (1819).

mean to the person who resided there, and that the defendant by accepting it acknowledged that he was the person to whom it was directed." This case has been much criticised. Patteson, J., speaks of it as an extreme case. It was followed in "Regina v. Hawkes,"[61] where there was an acceptance, but not in " Regina v. Currie,"[62] where there was no acceptance. The most that these cases determine is that the instrument may be declared on as a bill of exchange after acceptance, because then the identity of the drawee is fixed by the acceptance, but there has been great reluctance even in deciding this. Alderson, B., who decided " Regina v. Hawkes," said, referring to that case in " Peto v. Reynolds ": " With respect to the question whether this instrument is or is not a bill of exchange, the case of ' Regina v. Hawkes" is undoubtedly in point. I must own, however, that I now think I was wrong on that occasion. The case seems to have been decided on the ground that ' Gray v. Milner ' governed it, and the fact was not adverted to that ' Gray v. Milner ' may be thus explained, that a bill of exchange made payable at a particular place or house is meant to be addressed to the person who resides at that place or house. Therefore, in that case, the bill on the face of it was addressed to someone, and the court held that, inasmuch as the defendant promised to pay it, that was conclusive evidence that he was the person to whom it was addressed, but in the case of ' Regina v. Hawkes" it was addressed to no one." Professor Ames objects to the decision in " Gray v. Milner," and seems to consider it virtually overruled. He says: " An order addressed simply at No. 1 Wilmot Street, no one being named as drawee, is not a bill nor can it become one, even though accepted by the person belonging to the house. ' Gray v. Milner ' is opposed to this, but has been deservedly criticised, and since the case of ' Peto v. Reynolds,' must have possessed but little authority. The defendant in ' Gray v. Milner ' should have been charged as the maker of a note." That is to say, according to Professor Ames' view, the case should be considered as that of a bill not drawn upon anyone, but accepted nevertheless, which,

[61] 2 M. C. C., 60 (1838).
[62] 2 M. C. C., 218 (1841).
[63] *Ames cases on B. & N.*, 832.

according to the cases, is properly treated as the promissory note of the acceptor.

Non-negotiable bill, valid between parties. What makes bill non-negotiable.

21. When a bill contains words prohibiting transfer, or indicating an intent on that it should not be transferable, it is valid as between the parties thereto, but it is not negotiable. 53 V., c. 33, s. 8 (1). [E. s. 8 (1).]

Non-negotiable bill.—It will be seen in the comments under section 22 that the law has been changed in reference to the negotiability of bills of exchange and promissory notes. Formerly the words to order or bearer or equivalent words were required in order to make the instrument negotiable. Now the instrument is negotiable unless it contains words expressly prohibiting negotiation, or expressly restricting the payment of the money to some particular person, &c. Where the instrument is not negotiable it still possesses all the other qualities that distinguish such an instrument from a mere written order or promise. These will be explained in the course of the following comments. In brief, they are the qualities by virtue of which it is in the nature of a specialty, so much so that Professors Langdell and Ames distinctly call such an instrument a specialty.

May be payable to order or bearer.

(2) A negotiable bill may be payable either to order or to bearer.

Payable to bearer if only or last indorsement is in blank.

(3) A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank. 53 V., c. 33, s. 8 (2 & 3). [E. s. 8 (2 & 3).]

Bill is payable to bearer if last or only indorsement is in blank.—An indorsement in blank, otherwise called a general indorsement, is the mere writing of the signature of the payee or a subsequent holder across the back of the bill accompanied by delivery. Before the passing of the act if a bill had once become transferable by delivery by virtue of an indorsement in blank it could not be afterwards tied up by a special indorsement. It continued, notwithstanding such special indorsement to or to the

order of a special indorsee, to be nevertheless transferable by delivery. For instance, where a bill was payable to B., or order, and B. indorsed it in blank, C. to whom it was transferred, could not make it payable to the order of D. so as to require D.'s indorsement. Notwithstanding C.'s attempt to specially indorse it, it was still transferable by delivery from D. without any indorsement. This is now assumed by Judge Chalmers to have been changed by a very neat amendment of the law effected by this clause,—that is to say, if the last indorsement is not an indorsement in blank, but a special indorsement, even though it be preceded by an indorsement in blank, it will require the indorsement of the special indorsee to transfer the title to the bill which before the act passed could in such a case be transferred by mere delivery, having had that property permanently imparted to it by the prior indorsement in blank.

On this subject there is an important note in the Journal of the Canadian Bankers' Association * With regard to a cheque which has been made payable to bearer by indorsement and then by a subsequent indorsement made payable to order, the editing committee refer to the law as it was previous to the act and then to the amendment contained in this sub-section. They then add: "This sub-section does not appear to have ever been judicially interpreted, and it does not seem to clearly negative the idea that a bill may be payable to bearer under such circumstances * * * for it does not necessarily follow that the converse of sub-section 3 is true. We have not been able to find a case bearing on the point; but in view of the explicit declaration of Judge Chalmers we should think it very doubtful if the position that the cheque is payable to bearer could be sustained."

Cheque payable to bearer on its face cannot be indorsed to be payable to order.—The editing committee of the Canadian Bankers' Journal, referring to this sub-section, say "under sub-section 3 of section 8," (Act of 1890), "it is declared that a bill is payable to bearer which is expressed to be so payable. This seems to preclude the possibility of such a bill being made payable otherwise

*5 J. C. B., 477.

than to bearer and when a cheque is so drawn the drawer's instructions are not affected by an indorsement and the bank is protected in paying it to the bearer in accordance with its terms."†

Payee must be indicated with certainty.

21. (4) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty. 53 V., c. 33, s. 7 (1). [E. s. 7 (1).]

Payee need not be named as such, if indicated with certainty.—In an old case in Strange[64] the declaration was demurred to on a note substantially in the form: "I acknowledge that Sir Andrew Chadwick has delivered me receipt for ten pounds, which ten pounds and fifteen pounds five shillings balance due Sir Andrew I am still indebted and do promise to pay." He did say whom he was to pay, but it was reasonably certain that he meant to pay the person to whom he acknowledged himself indebted.

Pay Trustees of A. & Co., not naming them, is a good bill.—The case cited for this by Mr. Justice Maclaren, is "Auldjo v. McDougall."[65] It was the case of an indorsement in this form, but the principle would doubtless apply to the note or bill itself.

Pay to the estate of B.—This is said by Mr. Justice Maclaren to be a valid bill, on the authority of "Dominion Bank v. Beacock."[66] In another place he cites "Lewisohn v. Kent,"[67] to the effect that such a bill would be payable to a fictitious payee.

There seems to be no English or Canadian authority on the question, but a well reasoned case was decided in Massachusetts of "Shaw v. Smith,"[68] where the note was made payable to F. B. Bridgman's estate or order, and the objection having been taken that there was no payee definitely named, Allen, C. J., speaking for the

† 7 J. C. B., 69.
[64] *Chadwick v. Allan*, 2 Strange, 706 (1726).
[65] 3 U. C. O. S., 199 (1834).
[66] 9 C. L. T., 252 (1889).
[67] 87 Hun., N. Y., 257 (1895).
[68] 6 *Lawyers Reports* Ann., 348.

court, conceded that the two decisions cited by counsel sustained him in this contention; "Lyon v. Marshall," 11 Barb., 241, and "Tittle v. Thomas," 30 Miss., but said, "We think this is too strict an application of the doctrine that the person to whom a note is payable must be clearly expressed. It is an equally general rule that it is sufficient if there is in fact a payee who is so designated that he can be ascertained." He refers to the cases where bills of exchange have been held good where the payee was designated by his office, where such designations sufficed as the Manager of the Provincial Bank of England, the Treasurer-General of the Royal Treasury of Portugal, the executors of the late A. B., the administrators of a particular estate, the trustees acting under the will of the late Mr. W. B., most of which were English cases, and to several American cases in which the principle was applied. "In the case before us the promise was to pay F. B. Bridgman's estate or order. He was dead, and administrators had been appointed. There could be no doubt that the promise was intended to be one of which the administrators could avail themselves. They were in existence and were ascertainable. If the administrators of his estate had been made payees without naming them, there can be no shadow of question that it would have been sufficient. It savors too much of refinement to hold that the instrument was not a valid promissory note for want of a sufficiently definite payee."

Pay wages or order."—In the Gilbart Lectures, 1898,[69] Mr. Paget discusses the validity of this form of cheque, and concludes that it is not within the section making a bill payable to bearer where the payee is a fictitious or non-existing person. "Wages" is not a person. If the cheque were drawn "pay wages or bearer," it would be a plain case; but the definition of a bill of exchange, and therefore of a cheque, which is a bill of exchange drawn on a banker payable on demand, requires that it should be payable to a specified person or bearer. There is no possible indorsement, in this writer's opinion, which would make such a cheque

[69] 6 J. C. B., 249.

regular, and a banker would be justified in refusing the cheque of his customer drawn in this form." The reasoning seems clear and conclusive. It is conceded that there is no authority governing the question.

"Pay cash or order."—The Editing Committee of the Journal of the Canadian Bankers' Association say as to a cheque drawn in this form, that if "Cash" is not the name of a person the cheque should be treated as payable to bearer.[70] This is opposed to the view presented by Mr. Paget in the next preceding paragraph. In reply to a question in the preceding volume referring to the same kind of document they refer the questioner to Mr. Paget's discussion.[71]

Pay ——— order. Cf. pay ——— or order.—A document in the form of a bill of exchange was addressed in the manner first indicated, but was at first supposed by the court to have been in the form of ——— or order. It had been indorsed by the drawer. Referring to the bill in its supposed form with the words "or order" after the blank, Lord Esher, M. R., said,[72] "With regard to the proposition that a business man can put his name upon such a piece of paper stamped as a bill of exchange; that he can put his name on it as the drawer of a bill of exchange, that he can indorse it as a bill of exchange, hand it over for value as a bill of exchange; so that, (unless he intended at the time to take the objection that is now taken,) he must have meant it to be circulated as a bill of exchange, and that then, by the mercantile law, the instrument is invalid as a bill of exchange because of the mere absence of the name of a payee, (a defect which is not of the smallest practical consequence under the circumstances), this is a proposition to which it must not be taken that I give the slightest assent, although it is not necessary, in the present case, to express any judicial opinion on the point, and therefore it is wiser not to determine the point judicially." All the judges, Lord Esher, and Bowen and Kay, LJJ., agreed that whatever might be the

[70] 9 J. C. B., 236.
[71] 8 J. C. B., 77.
[72] *Chamberlain v. Young*, 1893, 2 Q. B., 209.

law with respect to a bill drawn to ——— or order, there could be no difficulty where the word "or" was omitted. It was clearly a bill to the order of the drawer, and the drawer's indorsement conferred title without the aid of any estoppels. Mr. Paget, in his Gilbart lecture on this topic,[72] discusses the question as to the validity of such a document as the bill in this case was at first supposed to be, and concludes that such a document—that is, a document making the money payable to "——— or order"—is not a bill of exchange or a cheque, and is not payable to bearer. It must be remembered that no member of the court said that such a document was a bill of exchange or a cheque. The document in question had been indorsed, and Lord Esher's strong language as to the position of the drawer who had indorsed and given currency to such an instrument, does not necessarily indicate that he would have regarded the document as a bill of exchange if in the form supposed. In the case of the "King v. Randall,"[72a] which Mr. Paget says is the only case he can find on the subject, the bill was payable to ——— or order. The defendant had been convicted of forging and uttering it, and all the common law judges except one sat to consider the matter, and they held the conviction bad on the ground that it was not a bill of exchange because there was no payee." The New Brunswick case of "Mutual Insurance Co. v. Porter,"[73] is in accordance with this ruling. It was there held that a promissory note in this form payable to ——— or order, could not be recovered upon by the person to whom it was given, either as payee or as bearer, without inserting his name in the blank as payee, but that any bona fide holder could insert his name in the blank as payee.

Where no payee is named in a note, and there is no blank, it is payable to bearer.—In "Daun et al. v. Sherwood,"[74] the document was, "We separately and conjointly promise to pay, one day after demand, the sum of five hundred pounds, &c., value received." Mr. Justice

[72] 6 J. C. B., 254.
[72a] R. & R., 195 (1811).
[73] 7 N. B., (2 Allen) 230, (1851).
[74] 2 J. C. B., 397.

Kennedy did not think the absence of the words "or to bearer" was fatal to the promissory note, if it was in fact a promise to pay, and he read it as a note payable to the bearer.

Fictitious or non-existing payee, payable to bearer.

21. (5) Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer. 53 V., c. 33, s. 7. [E. s. 7.]

Fictitious Payee.—One of the most remarkable cases in the books has arisen on the interpretation of this clause.[75] The Vagliano Brothers had been customers of the Bank of England, and were in the habit of making their acceptances payable there, which, under the cases, was held to be a direction to the bankers, or at least an authorization, to pay the acceptances and charge them to the acceptor's account. They had a foreign correspondent, Vucina, a Greek, who frequently drew upon them in the course of business, in favor of the firm of Petridi & Co., in Constantinople. In their own office in London was a clerk, who, becoming heavily involved in stock-broking transactions, resorted to the expedient of raising money by forging drafts in the name of Vucina as drawer on Vagliano Bros., in favor of Petridi & Co., forging letters of advice from Vucina to the Vaglianos of the drafts so forwarded, obtaining in this way the acceptances of Vagliano Bros. to the forged drafts, abstracting the drafts in that form from the bill-box, writing upon them the name of Petridi & Co. as indorsers, presenting them to the bank and obtaining payment of them. These transactions ran on for some months and aggregated the sum of upwards of seventy thousand pounds, which the bank charged up to Vagliano Bros., in account. They disputed the liability on the ground that the bank had no authority from them to pay the money without the genuine endorsement of Petridi & Co., to whom the acceptances had been made payable. For the bank, it was contended that, under the circumstances of the case, Petridi & Co. were not the real payees, that the case was that of a fictitious payee, or rather, to use exactly the words of the statute, that

[75] *Vagliano Bros. v. The Bank of England*, 22 Q. B. D. 103 (1888); 23 Q. B. D., 243; 1891, A. C., 107.

the bills had been made payable to a fictitious person, and they relied upon the provision that where the payee is a fictitious or non-existing person the bill may be treated as a bill payable to bearer.[76] If these bills were payable to bearer, the bankers were justified in paying them over the counter as they had done, and charging them to Vaglianos' account. Bowen, L. J., who delivered the judgment of the Court of Appeal, from which Lord Esher, M. R., dissented, entered into a careful examination of the cases previous to the act for the purpose of shewing that even a bill payable to a fictitious person could only be treated as being payable to bearer as against a party who knew the fictitious character of the transaction. He considered further that Petridi & Co. could not be regarded as fictitious persons simply because their names were used in a fictitious document, any more than Mary, Queen of Scots could be considered a fictitious person because she figures in "The Abbot."[77] The House of Lords, Lords Bramwell and Field dissenting, reversed the judgment of the Court of Appeal. In order to do so they had to hold, first, that the codifying act had not simply declared the law, but amended it, by making a bill drawn to the order of a fictitious person payable to bearer, whether the acceptor was aware of the fictitious nature of the transaction or not; and secondly, that although Petridi & Co. were a well-known and existing firm in Constantinople with whom Vaglianos were well acquainted, in whose favor they had frequently made acceptances and whose indorsement, it was argued, they might very well have supposed would be required before they could be made liable on these acceptances, yet, for the purposes of this enquiry, they were fictitious persons within the meaning of the act, and the bills were payable to bearer. Lord Herschell said: "It seems to me that where the name inserted as that of the payee is so inserted by way of pretence only, it may without impropriety be said that the payee is a feigned or pretended, or in other words, a fictitious person. Great stress was laid upon the fact that the words of the statute are, 'where the payee is a fictitious person,' and not, 'where the payee is fictitious.'

[76] Section 7 (3); 21 (5) of the present Act.
[77] 23 Q. B. D., at p. 262.

There is not to my mind any substantial difference in the meaning of the two phrases. * * * For the reasons with which I have troubled your lordships at some length I have arrived at the conclusion that wherever the name inserted as that of the payee is so inserted by way of pretence merely, without any intention that the payment shall only be made in conformity therewith, the payee is a fictitious person within the meaning of the statute, whether the name be that of an existing person or of one that has no existence, and that the bill may be treated in each case by a lawful holder as payable to bearer."

In "Clutten v. Attenborough,"[78] a clerk of the appellants, by fraudulently representing that work had been done for a named party who was really non-existent, induced them to draw checks to the order of the non-existent person so named. The clerk obtained possession of the checks, and by indorsing them in the name of the non-existing payee, negotiated them with the respondents. Lord Halsbury and other members of the House who took part in judgment, considered it too clear for question that the checks had been made payable to a non-existing person within the meaning of the section, and were, therefore, properly treated as "payable to bearer."

Vaglianos' case and Clutten v. Attenborough, distinguished from subsequent closely resembling cases.—The authority of Vaglianos' case and the case of "Clutten v. Attenborough & Sons," was invoked in the later case of "Vinden v. Hughes,"[79] which narrowly escaped being governed by the case first mentioned. The plaintiffs were market salesmen and had in their employ a confidential clerk and cashier whose duty it was to fill up cheques payable to the order of the various customers of the plaintiffs for the amounts due them and obtain the plaintiffs' signature. In the course of tw or three years he thus filled up twenty-seven cheques to the order of various customers, amounting in all to between four and five hundred pounds. There was no money due to the customers whose names were so used, or a sum less than the

[78] 1897, A. C. 90, H. L.
[79] 1905, 1 K. B., 795.

amount of the cheque at the time it was drawn. The clerk obtained the plaintiffs' signatures to the cheques so drawn, forged the names of the payees as indorsers and negotiated them with the defendant, who gave full value for them and obtained the money for them from plaintiffs' bankers. The question was whether the cheques had been made payable to fictitious or non-existing persons so as to become payable to bearer under this section. The application of Clutten v. Attenborough was ruled out because that case presented a question only as to a non-existing payee, and Warrington, J., held that the customers in whose favor the cheques had been drawn in this case were clearly not non-existent persons. The learned judge was much impressed, however, by the language of Lord Herschell in Vaglianos' case, which he quoted as follows:—"Where, then, the payee named is so named by way of pretence only, without the intention that he shall be the person to receive payment. is it doing violence to language to say that the payee is a fictitious person? I think not. I do not think that the word 'fictitious' is exclusively used to qualify that which has no real existence. When we speak of a fictitious entry in a book of accounts, we do not mean that the entry has no real existence, but only that it purports to be that which it is not, that it is an entry made for the purpose of pretending that the transaction took place which is represented by it. * * * It seems to me then that where the name inserted as that of the payee is so inserted by way of pretence only, it may, without impropriety, be said that the payee is a feigned or pretended, or, in other words, a fictitious person." Applying these words of Lord Herschell the learned judge asked the question, "Did Mr. Vinden draw this cheque in favor of T. H. Graves and the others 'as a mere pretence?' It is impossible to come to that conclusion on the facts of this case. It was not a mere pretence at the time he drew it. He had every reason to believe, and did believe, that those cheques were being drawn in the ordinary course of business for the purpose of the money being paid to the persons whose names appeared on the face of those cheques." In Vaglianos' case, as Warrington, J., points out, the bills were never drawn at all, they only purported to be drawn, the signatures of the supposed drawers being

forged. They were, it is true, accepted, payable to Petridi & Co., and as was argued in "Vinden v. Hughes," "the acceptor intended to pay Petridi & Co., just as here Vinden intended to pay these customers and yet the payee was held to be fictitious." Certainly, if the positions of acceptor in Vaglianos' case and the drawer of cheques in this case are compared they seem to be very much alike, and the part played by Glyka, the forger, in Vaglianos' case was played to perfection by the confidential clerk in this case. The question asked by Warrington, J., in this case, could have been asked with equal propriety in Vaglianos' case and must have received the same answer as in this case: "Did Vagliano accept the drafts in favor of Petridi & Co. as a mere pretence?" "He had every reason to believe, and he did believe," to quote the words of Warrington, J., that those drafts "were being drawn in the ordinary course of business for the purpose of the money being paid to the persons whose names appeared on the face of the drafts." In that case the money was not payable to Petridi & Co., and in this the matter is treated on the footing that there was no money owing to the customers or a sum less than the amount of the cheque. The only difference between the cases is that Glyka forged the name of a drawer to the draft with the name of an actual person as payee, while the confidential clerk in this case presented the unsigned cheque to Vinden to be signed payable to the order of the payee. The person swindled in this case was the drawer of a cheque. In that case he was the acceptor of a bill. It is not easy to see why this should produce any difference in the relation between the payee and the person swindled, to the effect that the payee whose name was that of a real person with whom Vagliano thought he was dealing, was in that case, nevertheless, a fictitious person within the meaning of the act, while in this case the customer to whom Vinden intended to make the cheques payable was not a fictitious person.

Perhaps the distinction is made a little clearer by the subsequent case of "Macbeth v. North and South Wales Bank,"[80] in which the case of "Vinden v. Hughes" is approved and followed. In that case the swindler, named

[80] 1906, 2 K. B., 718.

White, falsely represented to the plaintiff that he had agreed to buy from a man named Kerr 5,000 shares in a carriage company and required the plaintiff's financial assistance. For the purpose of enabling him to pay for the shares, plaintiff drew a cheque on the Clydesdale Bank, payable to Kerr, or order, which was delivered to the swindler in order that he might hand it to Kerr in exchange for the shares. Instead of so using the cheque, White forged Kerr's indorsement on the cheque and paid it into his own account with the defendant bank, who credited him with the amount and obtained it from the Clydesdale Bank. White had never in fact agreed to buy any shares from Kerr and Kerr did not hold any shares in the company. The question was whether the cheque had been made payable to a fictitious or non-existing person, and it was held that, as Kerr was an existing person designated by the plaintiff and intended by him to be the payee of the cheque, the payee was not a "fictitious person" within the section. Vaglianos' case is distinguished by the suggestion that in that case there was no real drawer. The bills had been drawn by Vaglianos' clerk, Glyka, to make Vagliano think that they were real bills drawn in the ordinary course of business by customers who were entitled to ask Vagliano to accept them. In truth, the whole bills were fictitious, though Vagliano believed them to be real and accepted them.

In the Ontario case of "The London Life Insurance Co. v. The Molson's Bank,"[80a] the assistant superintendent of the company, who was also the local agent at one of its branches, sent in a number of applications, which, with the exception of five, were fictitious. As to these five, the insurance subsequently lapsed, of which fact the company were kept in ignorance. Afterwards the agent, representing that the insured persons were dead and the claims payable under the policies, sent in to the head office claim papers, filling in the names of the claimants, and forging the signatures thereto, when cheques for the respective amounts made by the company in favor of the alleged claimants, and payable at a branch of the defendant's bank were sent to the agent, whose duty it was to see the payees and procure dis-

[80a] 8 O. R., 238 (1904).

charges from them. The endorsements of the payees' names were forged by the agent, and the bills were paid by the bank in good faith. It was held, on the authority of Vaglianos' case, that the cheques had been made payable to fictitious persons, and were payable to bearer, and that the bank could rightly charge them up to the company. Mr. Falconbridge thinks the case is irreconcileable with the two English cases commented upon in this note,[80b] and he is probably right. But the Ontario case seems, nevertheless, to be well founded on the decision in Vaglianos' case.

Mr. Justice Maclennan says, referring to the resemblances and differences between the two cases: "The present plaintiffs really intended their cheques to be paid to the named payees, while Vucina had no intention to pay anyone, his name having been forged. It was otherwise with Vagliano. He was the person who was to pay, and, when he accepted, his intention was to pay Petridi & Co., a firm at Constantinople, well known to him, and to whom he had, in the previous year, paid eleven similar bills. There can be no doubt that if the real indorsement of Petridi & Co. had been procured even fraudulently, that alone would have been a protection to the bank acting bona fide, without requiring to rely on section 7 (3). I am unable to see that there was any difference between the relation of the payee to the bill, treating the cheques as bills, in the one case and the other, and I think the law applicable to the two cases must be the same." While this case is thus in accord with Vaglianos' case, it must be admitted that the English decisions, whether they interpret and follow Vaglianos' case or not, seem to be soundly decided on principle. It would, of course, be treasonable to suggest that the solution of this puzzle may be that the court of appeal and the dissenting lords in the Vagliano case were more than half right.

Principle as to fictitious payee applied where a person carrying on business in firm name had ceased to do so before note to firm fraudulently procured.—The principle of Vaglianos' case was applied by the Supreme Court of New South Wales to the case where a man

[80b] *Falconbridge on Banking and Bills of Exchange*, 380.

named William Shackell called on the defendants at their warehouse and represented that he had wool to sell on account of James Shackell & Co., of Melbourne. He introduced to defendants a man whom he named Jones and represented to be the agent of Shackell & Co. A document purporting to be a store warrant for wool was handed to defendant and the note of the latter was delivered, made payable to J. Shackell & Co. The whole thing was a fraud and there was no such firm as J. Shackell & Co. or James Shackell & Co. at Melbourne, but at a time some years previous to the making of the note there had been a certain James Shackell carrying on business at Melbourne under the name of James Shackell & Co. He was living at Melbourne at the time the note was made, but had ceased to carry on business. The defendants when they made the note were not aware that J. Shackell & Co. had ceased to do business, but believed they were in fact dealing with that firm and, in that belief, inserted the name of J. Shackell & Co. as payees of the note. Under these circumstances the court held that the payee was a fictitious person and that the note should be treated as payable to bearer.[81]

Bill is negotiable unless containing words prohibiting transfer or implying prohibition.

22. A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable. 53 V., c. 33, s. 8 (4). [E. s. 8 (4).]

Bill is negotiable without express words,—unless containing prohibitory words.—This is an amendment of the law. Before the passing of the act the bill was not negotiable unless it contained words making it payable to order or bearer. Now it is negotiable, although made in terms payable to a named person, without such words, unless it contains words prohibiting transfer or indicating the intention that it should not be transferable. It does not, even with such words cease to be a bill of exchange or promissory note, (ante sec. 21.) It has all the qualities of a bill of exchange except negotiability, or, to speak

[81] *City Bank* v. *Rowan*, 2 J. C. B., 240 ; 1893, 13 N.S.W.R. (Law), 127.

more accurately, it has all the qualitiets of a non-negotiable bill of exchange. It can be declared on as a specialty and not merely as a simple contract, that is to say, as being itself the cause of action rather than as being merely the evidence of a contract. It imports consideration and the burden of proof of want of consideration is on the defendant. Whether it stands exactly in the same position as a note or bill before the act which was not payable to order has been questioned by Maclaren.[81a]

Bill to order of a person is payable to him or order at his option.

22. (2) Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order, at his option. 53 V., c. 33, s. 8. [E. s. 8 (5).]

Bill payable to order of payee or indorsee is also payable to payee or indorsee himself.—This sub-section is designed to embody the ruling in a case in which it seems to have been contended that a bill payable to the order of A. must, according to its literal terms, be payable only to some person other than A. to whom he should order it payable.[82]

Bill is on demand if so expressed or no time named.

23. A bill is payable on demand,

(a) which is expressed to be payable on demand, or on presentation; or,

(b) in which no time for payment is expressed.

Overdue bill is on demand as against person thereafter accepting or indorsing.

(2) Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand. 53 V., c. 33, s. 10. [E. s. 10.]

Demand notes have no days of grace. Otherwise as to sight drafts.—In the cases mentioned in this section the bill is payable without days of grace. By the Imperial act a bill payable at sight is also declared to be pay-

[81a] *Maclaren on B. & N.*, 3rd Ed., p. 65.
[82] *Fisher* v. *Pomfret*, 12 Mod., 125 (1697).

able on demand and comes among those on which days of grace are not allowed.[83] By the Canadian statute a bill payable at sight is included among those on which days of grace are allowed. See as to this, section 42 and comments thereunder.

Determinable future time includes;

24. A bill is payable at a determinable future time, within the meaning of this act, which is expressed to be payable,—

Bill at sight or fixed period after date or sight.

(a) at sight or at a fixed period after date or sight;

On occurrence of inevitable event, though time of happening is uncertain.

(b) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening is uncertain. 53 V., c. 33, s. 11; 54-55 V., c. 17, s. 1. [E. s. 11.]

Why days of grace allowed on sight drafts.—This section as passed in 1890 did not include the words "at sight."[84] When the bill was introduced it was the intention to assimilate the law to the English statute by including a sight draft among those payable on demand but it was pointed out in the House of Commons that a custom had grown up in this country of treating these drafts as entitled to days of grace, and that it would be desirable to legalize the custom. This section was accordingly amended in 1891 so as to be in accordance with that policy.

The bills referred to in this section are in a sense conditional, but good nevertheless.—A bill made payable at sight or after demand or presentation is in a sense conditional, as the bill may never be presented or demanded, but the act, following the decisions, expressly states in this section, that a bill is within the requirements of the definition which is expressed to be payable at a fixed period after date or sight. And a request to pay on demand is within the very terms of the definition of a bill of exchange.

[83] E., s. 10.
[84] *Canadian Hansard*, 1890, pp. 107, 108.

How as to a bill payable at a definite period after notice?—It is a little singular that the statute does not in this connection or anywhere deal with the case of a note or bill payable at a definite period after notice or demand. In "Walker v. Roberts,"[85] the promise was to pay "on demand to the said William Walker, giving James Roberts," (a maker), "six months' notice for the same." This, it was contended, was only a promise to pay money on certain conditions, but the contention was overruled by Cresswell, J., at Nisi Prius, who gave no reasons for judgment, simply saying, "I think it is a promissory note." In an earlier case of "Thorpe v. Booth,"[86] the promise was to pay "twenty-four months after demand," and the plaintiff recovered as on a promissory note. Mr. Ames comments on these cases, saying that "the objection seems not to have been taken that notice or presentment to the maker, except for payment, are special conditions wholly independent of the custom of merchants";[87] but notwithstanding his comments we may consider the principle of these cases well established. The promises are not conditional in any sense in which a bill payable on presentation or demand is not conditional. The time at which they are payable is uncertain, but it is no more uncertain than in the case of a bill payable on demand or at sight; and so far as the requisite as to certainty in the time of payment is concerned, they are less open to objection than such cases as that of "Colehan v. Cooke,"[88] referred to in the next following paragraph, where the bill was made payable at a certain period after the death of the maker's father, because the time for payment can be made certain by the holder and is not, as in that case, dependent on an event wholly beyond the holder's control.

If the uncertain event is inevitable the bill is not conditional.—Where the event upon the happening of which the payment is to be made by the direction in a bill or the promise contained in a note is one that must sooner or later happen although it is not certain when it will

[85] Car. & M., 590 (1842).
[86] Ry. & M., 388 (1826).
[87] 2 *Ames Cases on B. & N.*, 831.
[88] *Willes*, 393 (1743).

happen, the document is nevertheless good as a bill or note. Commenting on this class of cases, Mr. Ames says:[89] "The time of payment of a bill or note must be obvious from the bare inspection of the instrument, or else must be determinable by the holder by the simple act of presentment for acceptance or payment, that is to say by the performance of an act legally incident to the collection of the paper." But he is obliged to qualify this statement by adding that, "this rule, although clearly deducible from the nature of the bill or note as representative of money, has been in many cases ignored by the courts and the contrary doctrine put forward, that if the instrument is finally payable at all events no degree of uncertainty as to the precise time of payment will destroy its negotiability." Probably enough, if we were standing at the point of time when "Colehan v. Cooke"[90] was decided we would pronounce Mr. Ames' criticism unanswerable; but the discussion would, at this date, be purely academic. The rule suggested by Mr. Ames has been so constantly ignored by the courts, and "the contrary doctrine" so well established that it has become a part of the law of the land and is embodied in this subsection.

The case just mentioned of "Colehan v. Cooke," is important for its clear and full discussion of the earlier cases. The promise was by the defendant Cooke to pay Henry Delaney, or order, 150 guineas ten days after the death of defendant's father, John Cooke. The case is distinguished with great clearness from that in which money was made payable out of the growing subsistence of the drawer,[91] from that in which the promise was in the alternative,[92] from that in which the promise was to pay if the promisor's brother did not[93] and others of like nature. It was said to resemble the case of so-called "Billae nundinales," as to which L. C. J. Willes, who delivered the judgment, said that such bills "were always holden to be good because, although these fairs were not always holden at a certain time, yet it was certain that

[89] 2 *Ames Cases on B. & N.*, 831.
[90] *Willes*, 393 (1743)
[91] *Josselyn* v. *Lacier*, 10 Mod., 294, 316 (1715).
[92] *Smith* v. *Boheme*, Gilbert, 93 (1714)
[93] *Appleby* v. *Biddolph*, 8 Mod., 363 (1717).

they would be held." So here, although it was not known at what time the event would happen, upon the happening of which the payment was conditioned, yet it was certain that sooner or later it would happen and the promise become exigible.

The court explained on this principle the case of "Andrews v. Franklin,"[94] where the promise was stated to have been to pay within two months "after such a ship is paid off," and it was contended that this was payable on a contingency and therefore not a negotiable note; but the court said, "The paying off of a ship is a thing of a public nature, and this is negotiable as a promissory note." But for the recognition given to the case last mentioned in the judgment of the Court of Common Pleas it might have been open to us to say that it was badly decided. The money was made payable two months after the ship should be paid off, and, as it was quite possible that she might never be paid off, the promise was clearly conditional. Unless the paying off of the ship was as certain as death, or at least as certain as the holding of the markets on which the "billae nundinales" were conditioned, the case of "Andrews v. Franklin" was clearly distinguishable from the one before the court. Mr. Daniel, for this reason, regards it as a doubtful case.[95] So does Mr. Parsons and so also does Mr. Ames, who says without any hesitation, that "the decision in 'Andrews v. Franklin' is erroneous." It is followed, however, by Chalmers, who makes it the model of one of his illustrations, except that he makes the ship a government ship, which it was in the subsequent case of "Evans v. Underwood."[96a] In this case a note was held good where the document ran, "I promise to pay to George Pratt, or order, eight pounds, upon the receipt of his, the said George Pratt's wages, due from His Majesty's ship, the "Suffolk," it being in full of his wages and prize money and short allowance money for the said ship. After looking at the case of "Andrews v. Franklin," the court gave judgment for the plaintiff.

[94] *1 Strange* 24 (1717).
[95] *Daniel on Neg. Inst.*, 5th Ed., 54.
[96] *Chalmers on Bills*, 6th Ed. p. 31.
[96a] *Willes*, 262 (1749).
[97] *Willes*, 393 (1743).

But it would not be safe to follow such a decision. Mr. Daniel says, referring to the decision in "Andrews v. Franklin," that it has been "justly criticized and distrusted," and the decision in "Evans v. Underwood," is, at least, equally untrustworthy.

Promise to pay on a day certain or sooner, upon condition or at the option of promisor.—The paragraphs immediately preceding deal with the requirement that the time of payment must be certain. It has been found impossible to wholly separate the discussion of this topic from that of the requirement that the order or promise should be unconditional, but some further observations are required on this point.

Mr. Ames, as we have seen, insists upon this requirement as absolutely essential to the nature of a promissory note or bill of exchange, but he admits as we have seen, that the courts are against him, referring to the old cases of "Colehan v. Cooke"[98] and "Andrews v. Franklin."[99] Commenting on the decisions in these cases he observes that "while they have been followed in other jurisdictions, their authority has been greatly impeached, if they have not been actually overruled in the jurisdiction in which they were given." And he cites the case of "Alexander v. Thomas,"[100] where the bill was drawn by the defendant on Shardwell, requesting him ninety days after sight, or when realized of this his first bill of exchange, to pay plaintiff, or order, £1,256 13s. 4d. For the defendant it was contended that this bill was payable on a contingency; but the plaintiff answered that the money was payable at all events in ninety days and sooner if the drawee should be in funds for the purpose. Lord Campbell read the document to mean that it was not to be paid in any case unless the drawee was in funds, and if so, it was clearly not a bill of exchange. He adds, "Even, however, if the the other is the right meaning, namely, that the bill is payable sooner if the drawee should be in funds, and if not, at the end of ninety days at all events, I think this would not be a good bill, for the holder would have to watch and ascer-

[98] 1 *Strange*, 24 (1717).
[99] 2 *Ames Cases on B. & N.*, 831.
[100] 16 Q. B., 333 (1851).

tain the precise time when the bill should become payable, and if he failed in doing this and in duly presenting it the drawer would be discharged." The reasoning is essentially the same as that of Mr. Ames. The question presented by Lord Campbell's decision may be stated thus: if the ultimate limit at which the money is payable is definitely fixed, but a contingency may happen, not being some act to be done by the holder, such as presentation, notice or demand, to accelerate the payment, which will make the note or bill by its terms payable at an earlier and indefinite date, is the document good as a bill or note? Lord Campbell agrees with Mr. Ames in saying that it is not, and puts his answer upon the same reasoning, namely, that the other parties to the note cannot tell from the face of it when it is payable, but must be on the alert to ascertain when it must be presented. It must be noted, however, that this opinion of Lord Campbell was an "obiter dictum," because he thought this was not the real meaning of the document. It is a very reasonable opinion; but the reasoning that underlies it would apply equally to the case of "Colehan v. Cooke,"[1] in which the holder would have to be on the alert to learn when the father died and the promise became exigible. The principle of Lord Campbell's dictum was carried still further in the Supreme Court of Massachusetts in "Stults v. Silva,"[2] where the promise was "to pay Benjamin Newhall, or order, $2,268 in one and a half years or sooner at the option of the mortgagor," with interest semi-annually at seven per cent. during said term and for such further time as the said principal or any part thereof shall remain unpaid. The mortgagor was probably the maker of the note, although that is not treated as certain. Gray, C. J., said: "Both the time of payment of the principal and the amount of interest are uncertain and depend upon the election of the mortgagor, who would seem from the memorandum upon the note itself to be the maker of the note. But if he was a third person it would not aid the plaintiff. In either alternative the contract, not being a promise to pay a fixed sum of money at a definite period, lacks the essential quality

[1] *Willes*, 393 (1743).
[2] 199 Mass., 137 (1875)

of a promissory note and cannot be sued upon as such." The Supreme Court of Massachusetts in this case held a note to be bad which was made payable on or before a fixed day, at the option of the maker; but Mr. Ames does not accept that as a sound conclusion. On the contrary, after referring to the objections to the ruling in "Colehan v. Cooke," he proceeds to say that "neither of the objections just suggested applies to a note made payable at the option of the maker on or before a fixed day and such a note is negotiable."[3] In reference to such a note, in "Mattinson v. Marks,"[3a] Cooley, J., said: "The legal rights of the holder are clear and certain; the note is due at a fixed time and is not due before. True, the maker may pay sooner if he shall choose, but this option, if exercised, would be a payment in advance of the legal liability to pay, and nothing more. Notes like this are common in commercial transactions and we are not aware that their negotiability is ever questioned in business dealings. It ought not to be questioned for the sake of any distinction that does not rest upon sound reason."

The Supreme Court of Ohio adopted the same reasoning in "Jordan v. Tate,"[4] and added a suggestion that removes every difficulty that could stand in the way of treating such a promise as negotiable. "The negotiable character of a promissory note is not affected by the fact that it is made payable by its terms on or before the day named therein. Though the maker has a right to pay such a note at any time after its date, yet, for all purposes of negotiation, it is to be regarded as a note payable solely on the day therein named."

In view of the fact that the reasoning by which Lord Campbell supported his dictum in "Alexander v. Thomas,"[5] if carried to its logical consequences, would overrule the case of "Colehan v. Cooke,"[6] which was well established authority long before it was embodied in the code, and that Chief Justice Gray carried the principle of the dictum a great deal further when deciding "Stults v. Silva,"[7] the latter case may perhaps be safely disre-

[3] 2 *Ames Cases on B. & N.*, 831.
[3a] 18 Am. Rep 197; 31 Mich. 421.
[4] 14 Ohio, 586 (1869).
[5] 16 Q. B., 333 (1851).
[6] *Willes*, 393 (1743).
[7] 119 Mass., 137 (1875).

garded and it may be laid down that a promise to pay on or before a given day at the option of the maker is good in a promissory note, adopting the rational suggestion of the Supreme Court of Ohio in "Jordan v. Tate,"[7a] that for all purposes of negotiability, such as the date of presentment, protest and notice of dishonour, such a note should be regarded as payable solely on the date named.

Inland bill is or purports to be drawn and payable in Canada, or drawn in Canada on person there resident. Any other bill is foreign.

25. An inland bill is a bill which is, or on the face of it purports to be,—

(a) both drawn and payable within Canada; or

(b) drawn within Canada upon some person resident therein.

(2) Any other bill is a foreign bill.

May be treated as face appears.

(3) Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill. 53 V., c. 33, s. 4. [E. s. 4.]

Definition of inland bill.—The effect of this section is that if the bill is or purports to be drawn and payable within Canada it matters not that it is drawn on some person resident abroad and if it is or purports to be drawn within Canada upon some person resident in Canada it matters not that it is payable abroad. In either case it is an inland bill and unless the contrary appears on the face of the bill the holder may treat it as an inland bill whatever may be the actual facts.

It may assist the memory to bear in mind that in order that a bill may be an inland bill it must in all cases be or purport to be drawn in Canada, while of the other two conditions, that of being or purporting to be payable in Canada and that of being or purporting to be drawn upon some person resident therein, compliance with either one will suffice.

Importance of the distinction between inland and foreign bill. Protest of latter necessary.—The importance of the distinction between an inland and a foreign bill of exchange lies in the fact that, upon the dishonor of the latter by non-acceptance or non-payment, it must

[7a] 14 Ohio 586 (1869).

be protested in order to charge the drawer and indorsers. In the case of an inland bill no protest for dishonour is required excepting in the Province of Quebec,[8] although protest is now permitted to be made and the costs recovered as liquidated damages for breach of the contract to pay.[9]

Can a bill purporting to be an inland bill, but in fact drawn on a person out of Canada and payable out of Canada be treated as foreign bill?—Sub-section 2 of this section is said by Judge Chalmers[10] to be new law and he adds that "the result appears to be that though a bill purports to be a foreign bill, the holder may nevertheless show that it is an inland bill, for the purpose of excusing protest; while if it purports to be an inland bill though really a foreign bill, he may treat it at his option as either." Mr. Justice Maclaren admits the correctness of the first statement that if the bill purports to be a foreign bill the holder may show that it is an inland bill because, as he says, the act states that if it is drawn within Canada and complies with the other conditions of an inland bill it is an inland bill no matter whether it purports to be a foreign bill or not, but he questions the last part of the statement that if it purports to be an inland bill though really a foreign bill the holder may treat it as an inland or foreign bill at his option, saying that it does not appear to be authorized by any part of the section.[11] Of course Judge Chalmers would not suggest that it is authorized by the section. He would simply say that the section authorizes the holder to treat it as an inland bill because it purports to be one, but that the facts warrant him in treating it as a foreign bill because it is a foreign bill in reality. This is probably the correct light in which to view the matter. The object of the statute is not to prevent the holder from setting up the actual facts, but to enable him to estop any other person from denying the apparent facts; or if it is not merely a repetition, the matter may be stated in this way; the bill is in reality a foreign bill and therefore the holder may treat it as such,

[8] Sections 113, 114.
[9] Section 124, 134.
[10] *Chalmers on Bills*, 5th Ed., p. 16.
[11] *Maclaren on B. & N.*, 3rd Ed., 50.

not because the statute here says he may, but because it is such in fact and the statute nowhere says he cannot treat it as being what it is. Then the statute says he may treat it as inland bill because it so appears. Therefore, as Judge Chalmers says, he may treat it as either inland or foreign. The answer to this may be that the statute does say that the bill cannot be treated as what it really is,—or rather what it really would be but for the statute. The statute says expressly that if it purports to be that which would constitute an inland bill it is an inland bill. If the statute makes it an inland bill there is no provision which enables the holder to treat it as a foreign bill. It is difficult to decide between these views. As a matter of formal logic the latter view seems unanswerable and it is the view of Mr. Justice Maclaren. The probability is, nevertheless, that the former will be adjudged to have been the intention of the statute.

If drawee is fictitious or identical with drawer, holder may treat instrument as a note or bill.

26. Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note. 53 V., c. 33, s. 5. [E. s. 5.]

Option is holder's, not drawer's.—In "Capital, &c., Bank v. Gordon," 1903, A. C., at 250, Lord Lindley said as to the drafts there in question, that the bank which was both drawer and drawee was not entitled to treat them as bills of exchange, although a holder might do so.

Bill need not be dated. Nor specify value or that any value was given. Nor place where drawn or payable

27. A bill is not invalid by reason only,—

(a) that it is not dated;

(b) that it does not specify the value given, or that any value has been given therefor;

(c) that it does not specify the place where it is drawn or the place where it is payable;

May be antedated or postdated or bear date Sunday or non-juridical day.

(d) that it is antedated or postdated, or that it bears date on a Sunday or other non-juridical day. 53 V., c. 33, ss. 3 and 13. [E. ss. 3 and 13.]

Undated bill.—Section 30 further provides that where a bill payable at a fixed period after date is issued undated any holder may insert therein the true date of issue and the bill shall be payable accordingly provided that where the holder in good faith and by mistake inserts a wrong date and in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course, the bill shall not be voided thereby but shall operate and be payable as if the date so inserted had been the true date. Section 29 provides that where a bill is dated, the date shall be deemed the true date of the drawing unless the contrary is proved. (See, however, comment under section 30.)

Statement of value omitted.—Mr. Justice Byles, in his work on bills, says that there were some old cases tending to show that the words "value received" are an essential part of a bill,[12] and Mr. Justice Maclaren says distinctly[13] that formerly the words value received or some words implying consideration were necessary. However this may be, it was certainly settled long before the Bills of Exchange Act was passed that no such words were necessary,[14] and this clause simply declared the law as it stood at the date of its passing. When the words are inserted in a bill payable to the order of the drawer they imply value received by the acceptor.[15] Where the bill is payable to a third party they imply value received by the drawer from the payee, as was said by Bayley, J.,[16] "The object of inserting the words is to show that it is not an accommodation bill, but made on valuable consideration given for it by the payee."

Omission to state place where drawn or payable.—If the bill does not state the place where it is drawn the holder may treat it as an inland bill although it may have been drawn abroad if it has the other requirements of an inland bill. Section 25 (3). See also section 88 as to presentation when no place of payment is specified.

[12] *Byles on Bills*, 6th Ed, p. 98
[13] *Maclaren on B. & N.*, 3rd Ed., 47
[14] *Hatch v. Trayes*, 11 A. & E., 702 (1840).
[15] *Highmore v. Primrose*, 5 M. & S., 65 (1816).
[16] *Grant v. DaCosta*, 3 M. & S., 351 (1815).

Ante-dated or post-dated instrument.—We have seen, (ante p. 38), that parol evidence may be given to show the true date. In "Pasmore v. North,"[17] the bill was post-dated and indorsed by the payee who died before the ostensible date of the bill and it was contended that the indorsee derived no title, but he was allowed to prove that the bill had been post-dated and that the date of its actual issue was before the death of the payee. So also the true date of issue could be shown to defeat the defence of the statute of limitations set up on the strength of the apparent date. Mr. Daniel says that the fact that a bill is ante-dated or post-dated is not a suspicious circumstance.[18]

Post-dated cheque treated as a bill of exchange.—It was held in "Forster v. Mackreth,"[19] that a post-dated cheque was in effect the same thing as a bill of exchange at so many days as intervened between the day of delivery of the cheque and the date marked on the cheque,* and for that reason that where a post-dated cheque had been drawn by a member of a firm of attorneys it could not be assumed that the party who drew it had the authority of his co-partner as it would have been if the document had been a cheque in the proper sense of the word.

Cheque made payable at a future date.—The Canadian Bankers' Journal discusses the case of a cheque dated 15th December, 1901, across the face of which the words are written, "Payable 15th January, 1903." The editing committee say that "the crossing does not invalidate the instrument, but it is not a cheque, it is a bill of exchange payable on the 15th January, with three days grace, and the bank could not properly pay it before maturity."[19a]

Computation of time on post-dated instrument.—Time is computed on such bills according to the date

[17] 12 East., 517 (1811).
[18] *Daniel on Neg Inst*, 5th Ed., p. 107.
[19] L R., 2 Ex., 163 (1867).
* *Montague v. Perkins*, 22 L. J. C P., 187 (1853).
[19a] 10 J. C. B., No. 2, p. 62. See also 3 J. C. B., 392.

they bear and not according to the date of their actual issue.[20]

Instrument dated on Sunday.—The rule contained in the section as to bills bearing date on Sunday is the same as before the passing of the act. But if the obligation for which the bill was given arose out of a contract illegal because of its having been made on Sunday the bill would be one given upon an illegal consideration. It would be void as between the immediate parties, not because it bore date on Sunday, for it would be equally void between the parties if it bore date on any other day. As to bills payable on illegal consideration, see comments under section 56 (2).

Sum is certain although.

28. The sum payable by a bill is a sum certain within the meaning of this Act, although it is required to be paid,—

with interest added.

(b) with interest;

or by instalments,

(t) by stated instalments;

with provision for whole to become due if any unpaid.

(c) by stated instalments, with a provision that upon default in payment of any instalments the whole shall become due;

or according to indicated or ascertainable rate of exchange.

(d) according to an indicated rate of exchange or according to a rate of exchange to be ascertained as directed by the bill. 53 V., c. 33, s. 9. [E. s. 9.]

" With bank interest."—This section permits the addition of interest and provides that the bill is for a sum certain notwithstanding the addition of interest. This is in accordance with the maxim "id certum est quod certum reddi potest." But the maxim would not apply if the rate of interest were not definitely fixed either by law or by the agreement of the parties. It is not uncommon to use the phrase, "with bank interest," or "with interest at bank rates." In "Whitwell v. Winslow,"[21] the note was for a certain sum "with interest the same as savings banks pay." This was held to be an

[20] *Maclaren on Bills*, 3rd Ed , p. 83.
[21] 134 Mass , 343.

uncertain sum and the document was therefore held not to be a negotiable note.

"**With bank charges.**"—The editing committee of the Canadian Bankers' Association pronounce a draft with these words non-negotiable, on the ground that the Bills of Exchange Act declares the sum payable to be a sum certain, it if is payable according to a rate of exchange to be ascertained as directed by the bill. "This is the only provision in the act which could be looked to to support the proposition that a bill payable 'with bank charges' is for a sum certain and we do not think it would come within this section."[22]

Instrument payable by instalments is good; also with provision for acceleration on default.—The question whether a note payable by instalments was negotiable, was set at rest by Parke, B.,[23] who decided that such a note was a good note and that the maker was entitled to the days of grace on each instalment. This left the question still open as to such a note, with the further provision that the whole amount should become due on the failure to pay the first instalment. Parke, B., considered the point as virtually settled by the previous case, but the same question arising twenty odd years later, Pollock, C. B., thought there was a great difference between holding a note negotiable that was made payable by instalments and holding it negotiable when containing such a provision as to the acceleration of the principle.[25] "The custom of merchants has nothing to do with any but negotiable instruments, and I feel confident that if the question should come to be decided with respect to a bill of exchange there would be found to be no custom of merchants in the case of a bill of exchange with such a stipulation as that contained in this note, for I think no such bill of exchange ever existed or was known among merchants as a negotiable instrument." The question is now finally set at rest by this sub-section.

[22] 6 J. C. B., 308.
[23] *Oridge* v. *Sherborne*, 11 M. & W., 374 (1843).
[25] *Miller* v. *Biddle*, 13 L. T., 334, (1865).

Same as to an indicated rate of exchange.—A provision for payment according to an indicated rate of exchange is not so obviously unobjectionable as the provision for interest. It has been held in several Ontario cases and at least one case in New Brunswick, that such a promise made the sum payable uncertain and destroyed the negotiability of the instrument; and Mr. Justice Maclaren includes among his illustrations of invalid bills, " a promise to pay in Kingston, Canada, £72, with exchange on New York."[26] But, as Mr. Daniel says,[27] " If there be added to the amount ' with current exchange on another place,' the commercial character of the paper is not impaired, as that is capable of definite ascertainment. Exchange is an incident to bills for the transmission of money from place to place. The nature and effect are well understood in the commercial world and merchants having occasion to use their funds at their place of business sometimes make the currency at that point the standard of payments made to them by their customers at a different point."[28] In accordance with this reasoning, although without perhaps going so far as the reasoning would carry, the statute has here made a bill with the addition of exchange valid by declaring that the sum payable is a sum certain, " although it is required to be paid according to an indicated rate of exchange, or according to a rate of exchange to be ascertained as directed by the bill."

Words expressed control figures.

28. (2) Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable. 53 V., c. 33, s. 9. [E. s. 9 (2).]

Discrepancy between words and figures.—The figures usually appear in the margin on the left hand upper corner of the bill. In such a case they form no part of the bill, but, as Bowen, L. J., quotes from Marius,[29] " the figures at the top of the bill do only as it were serve

[26] *Carlon* v. *Kenealy*, 12 M. & W., 239 (1843).
[27] *Daniel on Neg. Inst.*, 5th Ed., p. 62.
[28] *Maclaren on Bills*, 3rd Ed., 40.
[29] *Garrard* v. *Lewis*, 10 Q. B. D., 33.

as the contents of the bill and a breviat thereof, but the words at length are in the body of the bill of exchange and are the chief and principal substance thereof whereto special regard ought to be had." In such a case it goes without saying that the amount expressed in words in the body of the bill is the amount of the bill, and in "Saunderson v. Piper,"[30] where there was a difference between the words and the figures, evidence was not allowed to be admitted to show that the words were inserted by mistake and the intention was to make a bill for the amount expressed in the figures. But this clause goes further. It covers the case which is not a usual one of the sum being expressed both in words and in figures in the body of the instrument and provides that in such a case the sum denoted by the words is the amount of the bill.

Interest runs from date, or if undated from issue, unless otherwise provided.

28. (3) Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated, from the issue thereof. 53 V., c. 33, s. 9. [E. s. 9 (3).]

Interest chargeable on the bill per agreement distinguished from interest "ex mora."—The interest payable by the terms of the bill must be distinguished from the interest payable as damages for the breach of the contract contained in the bill. The former is payable in fulfilment of the contract, the latter is payable "ex mora." The rate at which the latter is to be calculated will be considered under section 134. The rate at which the former is payable must be determined by the parties, or in the absence of an agreement as to the rate by the general law. The rate of interest in Canada is governed by chapter 127 of the Revised Statutes of Canada..

It has already been seen that where the bill or note is issued undated any holder may insert the true date, and where a wrong date is inserted the bill will operate and be payable in the hands of any bona fide holder for value without notice as if the date so inserted were the correct date. Interest will, therefore, in such a case be payable from the date that appears on the bill.

[30] 5 Bing., N. C., 431.

Date of bill, acceptance or indorsement deemed true unless contrary proved.

29. Where a bill or an acceptance, or any endorsement on a bill, is dated, the date shall, unless the contrary is proved, be deemed to be the true date of the drawing, acceptance or endorsement, as the case may be. 53 V., c. 33, s. 13. [E. s. 13.]

Date appearing on bill is presumed correct unless contrary proved.—This clause merely asserts that a general principle of evidence is applicable to bills and notes. The inference would be drawn from the words of the section that parol evidence is admissible to show that the date on the bill or the date purporting to be that of the acceptance or indorsement is not the true date. This was permissible before the act was passed and is so still.

Impossible date interpreted "cy pres."—Mr. Justice Maclaren says that a bill bearing an impossible date will be treated as if dated on the nearest day by the doctrine of "cy pres." For example, if it be dated September 31st, it will be considered to have been issued September 30th, for which he cites "Wagner v. Kenner,"[31] a Lousiana case.

Holder may insert date in undated bill.

30. Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at sight or at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly: Provided that,—

Wrong date so inserted does not avoid bill against holder in due course.

(a) where the holder in good faith and by mistake inserts a wrong date; and

(b) in every other case where a wrong date is inserted;

if the bill subsequently comes into the hands of a holder in due course the bill shall not be voided thereby, but shall operate and be payable as if the date so inserted had been the true date. 53 V., c. 33, s. 12; 54-55 V., c. 17, s. 2. [E. s. 2.]

[31] 2 *Robinson* (La.), 120 (1842).

Does this section change the law?—In the act of 1890 the proviso read as follows:—"Provided that (a) where the holder in good faith and by mistake inserts a wrong date, and (b) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course, the bill shall not be voided thereby, but shall operate and be payable as if the date so inserted had been the true date." The qualification as to the bill coming into the hands of a holder in due course applied only to clause (b) and not to the first clause of the proviso, and the meaning of the section was that, even in the hands of the immediate payee, a wrong date inserted by mistake could be treated as the true date, even, it would seem, by the person who made the mistake; and this was no unreasonable consequence to follow from the omission of the maker or acceptor to insert the date. The arrangement of the section in the present act and the change in punctuation make the qualification as to holder in due course apply gramatically to both clauses of the proviso. It remains to be seen whether this will be construed as a change in the law. Against that construction it will be contended that there must have been some difference intended between the case where the holder by mistake inserted a wrong date and the other cases in which a wrong date is inserted. Otherwise the division would not have been preserved. The two divisions include obviously every possible case in which a wrong date is inserted and there would have been no sense in dividing the cases into classes if it had not been intended to make some distinction between them. The courts may say that there has simply been a negligible mistake in the punctuation and printing.

Corresponding English section differs as to sight bills.—The corresponding section in the Imperial Act is not made applicable to bills payable at sight because they are by that act made payable on demand. Under the Canadian act days of grace are allowed and hence it is necessary to have the acceptance dated or provide for the case of its not being dated.

Practical necessity for date.—In "Mitchell v. Culver,"[32] in the Supreme Court of New York, Sutherland, J., while conceding that it was not essential to the legal validity of a note that it should be dated, pointed out that the date was necessary to its free and uninterrupted negotiability. "A note without a date will not be discounted at our banks nor pass in the money market without previous enquiry. All the parties, therefore, to a note intended for circulation must be presumed to consent that the person to whom such a note is entrusted for the purpose of raising money may fill up the blank with a date."

As to other blanks or omissions in a bill, see sections 31 and 32 and comments.

Signature given to be converted into bill is prima facie authority to fill up for any amount. So as to omission of any particular.

31. Where a simple signature on a blank paper is delivered by the signer in order that it may be converted into a bill, it operates as a prima facie authority to fill it up as a complete bill for any amount, using the signature for that of the drawer or acceptor, or an endorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a prima facie authority to fill up the omission in any way he thinks fit. 53 V., c. 33, s. 20. [E. s. 20.]

Must be filled up according to authority given. Proviso protecting holder in due course.

32. In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given: Provided that if any such instrument, after completion, is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.

(2) Reasonable time within the meaning of this section is a question of fact. 53 V., c. 33, s. 20. [E. s. 20 (2).]

[32] 7 *Cowen*, N. Y., 336.

Signature given in blank to be filled up as bill or note: cases distinguished.—Under the English act this provision is confined to signatures on stamped paper, and the "prima facie" authority is only to fill up the paper to any amount covered by the stamp. The clause could not be guarded in that way here as we have no stamp act, but it will be noted that it applies only when the paper is delivered with the intention that it may be converted into a bill and has no application to such a case as that put by Byles, J., in "Foster v. Mackinnon,"[a] of a signature written in an autograph album and afterwards made use of as that of the maker of a promissory note. Moreover, the delivery operates only as "prima facie" authority to fill it up as a complete bill. The defendant may still prove that the bill was not filled up according to the authority or within a reasonable time as required by the following sub-section, provided that if the instrument is in the hands of a bona fide holder for value, to whom it has been negotiated without notice of the facts, it is then valid and effectual for all purposes according to its tenor even though the authority was not regularly pursued and the bill was not filled up in a reasonable time. The proviso, as will be seen by the following note, applies only to one who takes by way of negotiation and not to the person to whom the document so filled up is handed in the first instance, although he may have taken the document in good faith and without notice and perhaps may be held to be a holder in due course within the meaning of the act. See "Herdman v. Wheeler,"[33] referred to in following note.

Mr. Justice Maclaren mentions a case where a debtor gave his creditor a blank promissory note and subsequently failed, and the creditor did not fill up the note until after the debtor had obtained his discharge five years later. The jury found that the delay was not under the circumstances unreasonable and the verdict was upheld. "Temple v. Pullen,"[34] (1853.)

The cases as to bills issued with the drawer's or payee's name in blank are dealt with by Chalmers and Maclaren under this section.

[33] 18 *Times* L. R.
[a] L. R. 4 C. P. at 712.
[34] 1902, 1 K. B. 361.

Proviso making bill good where improperly filled up applies only to bona fide holders who take by negotiation.—In "Herdman v. Wheeler,"[35] the defendant gave one, Anderson, a blank stamped paper to be filled up as a promissory note for £15. Anderson filled it up for £30, inserting plaintiff's name as payee and procured from plaintiff a cheque for £25 payable to defendant, on which he forged defendant's name and obtained the money. He gave defendant his own cheque for £15, which was afterwards dishonored. The plaintiff had advanced the money in good faith on receiving the note apparently duly filled up. It was held that he was not within the protection of the proviso because, although possibly a holder in due course, he had not become so by negotiation. The 31st section of the English act, (Canadian act, section 60), enacts "that a bill is negotiated when it is transferred from one person to another, &c." Channell, L. J., refers to the argument for the defendant that, "even if the payee of a note may be a holder in due course, the question whether he is so or not depends upon the actual state of facts as between him and the maker of the note, and the contrast between the payee and the maker of the note, though it has some incidents written into it by the law merchant, yet is governed more by the ordinary law of contracts than by the law merchant, and in particular the element of negotiability in no way enters into the contract between the maker and the payee. There is much," he says, "to support this argument in the Bills of Exchange Act. In the present case the delivery of the note to the plaintiff must, in order to enable him to recover, be under the authority of the defendant. It certainly was not so delivered by the defendant's actual authority, and can only be said to have been delivered under his authority by reason of the ostensible authority with which Anderson had been clothed by the signature in blank. Mere possesion of a promissory note, complete and regular on the face of it, would not be conclusive evidence that the maker had given authority to the person in whose possession it was to deliver it to the maker. Anderson, if agent of the defendant at all, was only agent to fill up the paper, and if the question were to be deter-

[35] 1902, 1 K. B. 361.

mined altogether apart from the law merchant and the Bills of Exchange Act, we should have to say there was here no binding contract at common law whereby the defendant promised the plaintiff that if the plaintiff would give £25 to Anderson for the defendant, the defendant would pay £30 to the plaintiff in a month." The court did not determine how the case would have been decided before the passing of the Bills of Exchange Act, but inclined to the view that even before and apart from the act the result would have been the same. The decision is based on the words of the proviso, the court holding that "negotiated" meant "transferred by one holder to another."

Blank for name of drawer, payee, &c.—In "McCall v. Taylor,"[36] (1865), where there was no drawer, the place for the drawer's name having been left blank in a bill drawn on Captain Taylor for the price of goods supplied to ship "Jasper," Erle, C. J., suggested that the captain had possibly given the bill for necessaries supplied to the ship and that the plaintiff might have had authority to put his name to the bill as drawer, but, in the form in which the instrument came before the court, it was inchoate and imperfect. A strong case of this kind, where the plaintiff did insert his name as drawer, was that of "Scard v. Jackson,"[37] in 18 5, where the plaintiff came into possession, as administratrix, of a bill of exchange accepted by the defendant but without any drawer's name. The bill was overdue, but nevertheless the plaintiff was permitted to sign her name as a drawer and sue on the bill as administratrix. Of course the instrument is not until so filled out a bill of exchange. It is only, as was said in "McCall v. Taylor,"[38] inchoate and incomplete and, therefore, where an instrument in that form, complete except for want of a drawer's name, accepted by the drawee, was transmitted to the acceptor's creditor to be signed by him as drawer, it was held that the document was not a bill, order, note or security for the payment of money.[39] Whether the obiter dictum

[36] 34 L. J. R., 365 (1865).
[37] 34 L. T. R., 65, note *a*.
[38] 34 L. J. R., 365, (1865).
[39] *Stoessiger v. S. E. R. Co*, 3 El. & Bl, 549.

of Lord Campbell, C. J., can be defended is another question. He said that he could not agree that the executors of Goold to whom the acceptor was indebted, could have made it valuable by putting to it his name or their own name, or any name whatever.[40] This seems to be out of accord with "Scard v. Jackson," which Chalmers, Maclaren and Ames all consider a well decided case. In the year following "Scard v. Jackson" came the case of "Harvey v. Cane,"[41] (1876), in which one, Clippingdale, had transactions with Cane to whom he had sold corn and whose acceptance he received in payment. The bill did not have Clippingdale's name signed as drawer and Clippingdale handed the bill in that form for value to the plaintiff, who signed his own name as drawer. There was no evidence of any condition that Clippingdale alone should sign as drawer. Had there been any such condition it seems that the plaintiff would have been bound thereby, as he was taking a bill incomplete on the face of it. It was held that any person who became bona fide the holder of the bill had the right to fill in his name as drawer. The expression of Maule, J., in "Montague v. Perkins," is quoted by the judge with approval, that the defendant when he wrote his name in blank and issued this acceptance must have known what was obvious to anybody, that he put it in the power of any person to whom he gave it to fill it up and pass him off as having accepted the bill for any amount at any time warranted by the stamp. He must be taken to have intended the natural consequences of this act." He also quotes the statement of Sir John Byles, " it is not even necessary that the bill should be drawn by the same person to whom the acceptor handed the blank acceptance."

The name of a payee has been filled in on the same principle, as in "Crutchley v. Clarence,"[42] where the defendant in Jamaica had drawn a bill on one Henry Mann of London, leaving a blank for the name of the payee, and the bill was negotiated in London by one, Vashon, who indorsed it to the plaintiff in payment of an old debt and plaintiff inserted his own name as payee. Lord Ellenborough said, "As the defendant has chosen

[40] Ib., at p 557.
[41] 34 L. T. R. 64.
[42] 2 M. & S., 90, (1813.)

to send the bill into the world in this form, the world ought not to be deceived by his acts. The defendant, by leaving a blank, undertook to be answerable for it when filled up in the shape of a bill." Bayley, J., said the issuing of the bill in blank without the name of a payee was authority to a bona fide holder to insert the name, and LeBlanc, J., said, "It is the same thing as if the bill had been made payable to bearer." These cases and dicta are referred to and commented on in the case of "Herdman v. Wheeler,"[43] and must, since the decision in that case, be used with care. Channell, L. J., doubts, in that case, if the blanks were in any of these cases filled up otherwise than as actually authorized.

Referee in case of need

33. The drawer of a bill and any endorser may insert therein the name of a person, who shall be called the referee in case of need, to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment.

Resort to such referee optional.

(2) It is in the option of the holder to resort to the referee in case of need or not, as he thinks fit. 53 V., c. 33, s. 15. [E. s. 15.]

Protest must precede presentation for payment to case of need.—Section 117 provides that before a bill is presented for payment to the referee in case of need it must be protested for non-payment, but by section 119, where protest is required, it is sufficient to note the protest within the required time, the protest being afterwards extended.

Drawer or endorser may

34. The drawer of a bill, and any endorser, may insert therein an express stipulation,—

Negative or limit liability.

(a) negativing or limiting his own liability to the holder;

Waive some or all of holders duties.

(b) waiving, as regards himself, some or all of the holder's duties. 53 V., c. 33, s. 16. [E. s. 16.]

[43] 1902, 1. K. B. 361.

Indorsement without recourse. Waiver of presentation or protest.—The drawer and indorsers are in the nature of sureties for the acceptor and are entitled on non-payment to notice of dishonor. It is not unusual for the indorser to guard himself against his liability by writing under his signature, "without recourse," or "sans recours." Any similar phrase will effect the object. It is not usual for the drawer to thus limit his liability, but both drawers and indorsers frequently dispense with the necessity of notice of dishonor or protest, for which purpose any apt words will be sufficient, those most commonly used being, "notice of dishonor waived," "protest waived," or "return without protest."

Acceptance and Interpretation.

Acceptance defined.

35. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer.

Wrong designation of payee or name misspelled.

(2) Where in a bill the drawee is wrongly designated or his name is misspelt, he may accept the bill as therein described, adding, if he thinks fit, his proper signature, or he may accept by his proper signature. 53 V., c. 33, s. 17. [E. s. 17.]

36. An acceptance is invalid unless it complies with the following conditions, namely:—

Acceptance must be written on bill and signed.

(a) It must be written on the bill and be signed by the drawee;

Must not be otherwise than for payment in money.

(b) It must not express that the drawee will perform his promise by any other means than the payment of money.

Signature of acceptance sufficient.

(2) The mere signature of the drawee written on the bill without additional words is a sufficient acceptance. 53 V., c. 33, s. 17. [E. s. 17.]

Acceptance may be indorsed, but should be on face of bill.—The acceptance of the bill is usually expressed by writing the signature of the drawee across the face of the bill, which may be and frequently is preceded by

words indicating his acceptance. Regularly the acceptance should be written on the face of the bill, but in "Young v. Glover,"[44] it was suggested by Lord Campbell, C. J., that it would be a valid acceptance if the drawee wrote "accepted" on the back of the bill, followed, as he must have meant, by his signature.* There can hardly be room for doubt that this would be a good acceptance. All that the act requires in this respect is that it should be written on the bill. If it is on the face of the bill the signature of the drawee is enough. If not, it might happen that the word, "accepted," or some equivalent expression would be required to make it certain that the signature was not placed on the bill as that of an indorser.[45]

History of the law as to acceptance.—A number of cases in Mr. Ames' selection relate to the subject of acceptance which, although they may be necessary for students and practitioners elsewhere, have only an historical interest for us in this country, having been rendered obsolete by legislation. They consist of cases as to so-called constructive acceptance or virtual acceptance, cases of oral promises to accept and distinctions between the liability of the virtual acceptor to the person to whom his promise to accept was made and his liability to other persons, depending on the question whether such others have given credit to the bill on the faith of the promise to accept. The question has even been mooted whether a bill could be accepted or not by a promise to accept before it was in existence as a bill. All these questions and sundry others have been set at rest for us by legislation extending as far back as the reign of Queen Anne. The statute of that reign by which promissory notes were made negotiable and put in this respect upon the same footing as bills of exchange[46] contained provisions which it was conjectured were intended to do away with parol acceptances altogether, but cases still continued to be

[44] 3 Jur., N. S., 637. (1857.)

* Perhaps this suggestion goes too far. See next following note. It is left in the text, however, for fear that the following sentences would, if it were omitted, be misleading. The signature is now necessary, whatever the law may have been in Lord Campbells day.

[45] See Sec. 131.

[46] 3 & 4 Anne, Cap. 9.

decided as to oral and virtual or constructive acceptances until 1821, when it was enacted[47] that, from a certain date named in the act, no acceptance of any inland bill of exchange should be sufficient to charge any person unless the same should be in writing on such bill, or if there should be more than one part then on one of such parts. It was Parke, B.'s, opinion that this statute was only intended to restore the true meaning of the Statute of Anne, which had been improperly restricted by judicial construction. The matter is of only historical interest, and for that reason it is not necessary to refer to the cases.

It will be noticed that the statute last mentioned refers only to inland bills of exchange, but its provisions were extended to all bills of exchange in 1856 by a statute[48] providing that no acceptance of any bill of exchange, whether inland or foreign, (made after a specified date), "shall be sufficient to bind or charge any person unless the same be in writing on such bill, or if there be more than one part of such bill, on one of said parts, and signed by the acceptor or some person duly authorized by him." It was not unreasonable to assume that, as the later statute provided in terms that the acceptance should be in writing and signed by the acceptor, while the earlier statute as to inland bills merely enacted in terms that the acceptance should be in writing, there was a deliberate intention underlying the difference in the terms used by the legislature. It had been held under the earlier statute that the mere signature of the acceptor was sufficient, and, further, that if the words of acceptance were written on the bill without any signature they would constitute an acceptance if so intended, which was a question for the jury. Under the later statute it was considered that, comparing the words of the later statute with those of the earlier, it was impossible to hold that the mere signature of the drawee could be held to fulfil the double requirement that the acceptance should be "in writing on the bill and signed by the acceptor." The decision establishing this distinction was nullified in the year in which it was made by an enactment reciting the previous legislation and the doubts that

[47] 1 & 2 Geo. 4, Cap 78
[48] 19 & 20 Vict., Cap. 97.

had arisen upon its meaning and declaring that the "acceptance of a bill of exchange is not and shall not be deemed to be insufficient under the provisions of said statutes by reason that such acceptance consists merely of the signature of the drawee written on such bill."[49] The codifying act shows in the section now under consideration curious and interesting traces of the history of the law. It defines the acceptance of a bill as "the signification by the drawee of his assent to the order of the drawer, and, after declaring that "it must be written on the bill and signed by the drawer," it proceeds to qualify the statement by explaining that "the mere signature of the drawee without additional words is a sufficient acceptance.[50]

Constructive acceptance and promise to accept.—We have seen that since the passing of 19 and 20 Vic., c. 97, there can be no acceptance of a bill otherwise than in writing on the face of the bill. But a party may, by agreement, be under an obligation to accept, for the breach of which if there is consideration an action may be brought. In "Bank of Montreal v. Thomas,"[51] the defendants had drawn a bill on Feehan, which was due December 2nd, 1887. On that day the defendants being apprehensive that the acceptance would not be paid, telegraphed Feehan to draw on them "for draft due to-day if you cannot pay it." This telegram was shown to the plaintiffs who discounted a sight draft on defendants for the amount and gave Feehan a certified cheque with which the draft then due was retired at the Molsons' Bank, where it was held. Defendants refused to accept the sight draft on the ground that the time at which it was drawn was too short. Armour, C. J., found as facts that defendants had reason to know, and did necessarily know, that their telegram would be shown to any bank through which Feehan would draw in accordance with their instructions, and that there was a clear equity to order the defendants to accept the draft as drawn, but, as the draft was long past due, the court had power to order the defendants to pay it. The head-note seems to indi-

[49] Section 35.
[50] Section 36 (2).
[51] 16 O. R., 503.

cate that the court on appeal took a shorter route to their conclusion, and found a contract directly between the defendants and the plaintiff under which the latter were entitled to bring action for the money advanced to Feehan. This is in accord with the decision of Lord Cairns in re Agra and Masterman's Bank,[52] the circumstances of which were very similar.

In "Torrance v. Bank of British North America,"[53] the respondents were the holders at their Montreal office of a bill drawn by Yarwood upon the appellants, who were accommodation acceptors for Yarwood. The latter arranged with the bank at London for a renewal, representing that the Messrs. Torrance, the appellants, would be willing to renew. A bill was accordingly drawn by Yarwood at three months on Torrance & Co., the appellants, which was discounted by the bank and Yarwood's cheque on the bank was accepted, payable at Montreal, which was sent to Torrance & Co. for the purpose of retiring the bill due or coming due at Montreal. Torrance & Co. held the cheque but refused to accept the renewal. It was held, of course, that they could not retain the cheque without using it for the purpose for which it had been sent, the jury having found that they had reason to believe, which in the opinion of the court was the same thing as finding that they had knowledge, that the cheque was forwarded to them on the assumption that they would renew the bill. They were not entitled to take advantage of the agreement which had been made between Yarwood and the bank to which their assent was requested, by cashing the cheque, unless they meant to bind themselves to act upon the agreement by accepting the bill of exchange. It was not found necessary to say what the precise remedy would be under English law,—the case having been decided by the law of Quebec,—but it was clearly intimated that in the opinion of the Board an action would lie for money had and received.

Acceptance must be communicated, i e., notified.—A further requisite of a valid acceptance is not mentioned here. The acceptance must be communicated. The

[52] L. R., 2 Ch., 391.
[53] 5 P. C., 246.

requirement as to this is set out in section 39, where acceptance is distinguished from the other contracts on a bill which are incomplete without delivery.

Drawee wrongly designated or name misspelled.—The provision as to this point does not appear in the Imperial Act, but a provision in exactly similar terms is contained in the Imperial Act with reference to a wrong designation of the payee or indorsee or the misspelling of his name, except that in the Imperial Act the provision allowing him to use his proper signature alone is omitted.[54] In the Canadian Act Mr. Justice Maclaren points out that the expression, "if he thinks fit," is used in this clause but not in the corresponding clause with reference to the wrong designation of the payee.[55] The consequence is that the acceptor may either use the designation used in the bill, or he may do this and add his own signature, or he may accept by his own proper signature alone. The indorser cannot, it would seem, make use of the incorrect designation of the payee or indorsee in the bill without explaining it by his proper signature, but he may, if he chooses, use his proper signature and that alone. See section 64.

Bill may be accepted.

37. A bill may be accepted,—

Before signed or completed.

(a) before it has been signed by the drawer, or while otherwise incomplete;

When overdue or after dishonored by non-acceptance or non-payment.

(b) when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment.

Holder entitled to acceptance as of date of first presentment.

(2) When a bill payable at sight or after sight is dishonored by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance. 53 V., c. 33, s. 18; 54-55 V., c. 17, s. 3. [E. s. 18.]

[54] *Bills of Exchange Act*, 1882, sec. 32 (4).
[55] *Maclaren on B. & N.*, 3rd Ed., p. 99.

Bills at sight accepted after dishonor.—The inclusion of bills drawn at sight in the provisions of this section was effected by the amending act of 1891. The omission in the original act was inadvertent.

Must the acceptance, after dishonor, be dated on the day of first presentment, or may the drawee date it two days' later?—A question may arise on the construction of this section in view of the amendment of the act in 1902 by 2 Edw. VII., cap. 2, s. 1, which is now section 80 (4). By that amendment the drawee, who has two days to consider whether he will accept or not, may date his acceptance on the day on which he actually accepts, although it may be two days after the first presentment to him. Does this clause require that in the case provided for he must date his acceptance on the day when the bill was presented, or only that he must date it as he could have done if he had not dishonored it on its first presentment to him for acceptance? In other words, is the clause merely intended to guard against the acceptance being dated as of the date at which, after the dishonor of the bill, the drawee determines to accept? This would seem to be a reasonable construction of the clause, and would be in accordance with the amendment of 1902. But the literal reading of the section may require that where the bill has been dishonored, the subsequent acceptance must be dated on the day of presentment. In that case sec. 80 (4) will apply to the case of a due acceptance only, and in the exceptional case to which this clause is applicable, the indulgence given by section 80 (4) will not apply. This is a severely logical way of reading the statute, and it will probably prevail.

General acceptance and qualified acceptance.

38. An acceptance is either,—

(a) general; or

(b) qualified.

General acceptance is an unqualified assent to drawer's request.

(2) A general acceptance assents without qualification to the order of the drawer.

Qualified acceptance may be—

(3) A qualified acceptance in express terms varies the effect of the bill as drawn and in particular, an acceptance is qualified which is,—

Conditional;

(a) conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated;

Partial;

(b) partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;

Qualified as to time.

(c) qualified as to time;

Acceptance of some only.

(d) the acceptance of some one or more of the drawees, but not of all.

Acceptance payable at particular place is not qualified.

(4) An acceptance to pay at a particular specified place is not on that account conditional or qualified. 53 V., c. 33, s. 19. [E. s. 19.]

Certification or marking of cheque.—A cheque is a bill of exchange drawn on a bank, payable on demand, and the certification of the cheque or marking by the banker has some analogy to the acceptance of a bill. The subject will not, however, be considered here but will be dealt with under Part III., which relates to cheques.

Acceptance should be "secundum tenorem billae"; that is called general or absolute acceptance. Consequences of taking a qualified acceptance.—The acceptance should import a promise to pay according to the tenor of the bill, and, as the bill must be for the payment of money and would not be a bill of exchange if exigible otherwise than in money, it follows that the acceptance "must not express that the drawee will perform his promise by any other means than the payment of money." The holder of the bill is entitled as against the drawer to have an

acceptance from the drawee exactly following the tenor of the bill as drawn. This has been called an absolute acceptance, but the statute uses the term general acceptance to describe an acceptance of this kind. Any other acceptance may be refused by the holder and treated as a dishonor of the bill, (sec. 83). But the holder may, if he chooses, take an acceptance which is not according to the terms of the bill and which is called by the act a qualified acceptance. The consequence of taking such an acceptance without the previous authority or subsequent assent of the drawer or indorser is that the non-assenting drawer or indorser is discharged, except in the case of an acceptance for a part only of the amount as to which the statute has made a change in the law by section 84.

Is form of acceptance on bill part of the instrument?—This question is asked in the Canadian Bankers' Journal, where it is said that it is the practice of some houses to provide a blank acceptance on their bills, naming the place of payment. The case is put of a drawee ignoring this form and writing an acceptance independently of the form. The answer of the editing committee is that this form is not an integral part of the bill; that it may be altered or ignored by the drawee, and that in the case put, the bill would be payable in the same manner as if the former had not been provided.[a]

What is a qualified acceptance—The statute says that, in particular, an acceptance is qualified which is, inter alia, conditional; that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated; but an acceptance to pay at a particular specified place is not conditional or qualified.

The bill may be accepted payable "when in funds," or "to be paid when goods consigned to the drawee are sold." The acceptor is bound by such a promise in an acceptance, while as we have seen, a promise so made in a promissory note would not render him liable as the maker of a promissory note, but merely on an agreement. In this connection, therefore, Judge Chalmers makes an acute observation, after comparing bills of exchange with promissory notes, the acceptance of the order of the

[a] J. C. B., 453-454.

drawer in the former corresponding to the promise of the maker in the latter. "It is the same contract stated conversely. There is, however, this distinction. A bill may not be drawn conditionally and a note may not be made conditionally; but a bill may be accepted conditionally; therefore, the liability of the principal debtor on a bill may be conditional, while the liability of the principal debtor on a note must be absolute."

Acceptance may be partial.—A partial acceptance is an acceptance to pay part only of the amount for which the bill is drawn. A very old case of this kind appears in Mr. Ames' collection, in which the drawee wrote, "I do accept this bill to be paid half in money and half in bills," which was both partial in amount and objectionable as to the balance, being a promise to pay in a medium other than money. It was proved in this case "by divers merchants that by a custom among merchants there might be a qualification of an acceptance, for he that may refuse a bill totally, may accept it in part. But he to whom the bill is due may refuse such acceptance and protest it so as to charge the first drawer."

The acceptance for part only of a bill is an exception to the general rule that the holder taking a qualified acceptance without the authority or assent of the drawer or indorser thereby discharges such non-assenting party. Section 84. "Due notice" of such acceptance must be given.

Acceptance to pay at a particular place is not a qualified acceptance.—The law as to a bill accepted payable at a particular place presented a very debateable question which was elaborately argued in the leading case of "Rowe v. Young,"[56] where the Lord Chancellor submitted to the twelve judges the following question:—"Thirdly, whether, if A. drew a bill upon B. in favor of C. for one hundred pounds, and C., without the previous authority or subsequent assent of A., took an acceptance of the bill for the whole of the hundred pounds, but an acceptance qualified as to time or place of payment, C. could, notwithstanding his taking such acceptance, maintain an action on the bill against A.?" All the judges

[56] 2 Bro. & B., 165.

held, in answering this question, that if the holder took an acceptance qualified as to time without the previous authority or subsequent assent of the drawer he thereby discharged the drawer; but, on the second branch of the question, that is as to the effect of an acceptance qualified as to the place of payment, they differed, three of the judges holding that an acceptance qualified as to place of payment "ipso facto" discharged the drawer, while the others held that the qualification as to the place of payment did not discharge the drawer unless it could be said to be material for the reason that it occasioned inconvenience or injury to the drawer. Notwithstanding this opinion of the majority of the judges the acceptance was treated as a qualified acceptance and it was held that the bill must be presented for payment at the place mentioned in the acceptance and that presentment at that place must be averred and proved. To obviate this necessity Sergeant Onslow's Act was passed by which it was enacted that "if any person shall accept a bill payable at a banker's house or other place without further expression in his acceptance such acceptance shall be deemed to all intents and purposes a general acceptance of such bill; but if the acceptor shall in his acceptance express that he accepts the bill payable at a banker's house or other place only and not otherwise or elsewhere, such acceptance shall be deemed to all intents and purposes a qualified acceptance and the acceptor shall not be liable to pay the said bill except in default of payment, when such payment shall have been first duly demanded at such banker's house or other place."[57] The effect of this statute is exactly reproduced in the English "Bills of Exchange Act, 1882," which enacts that an acceptance may be qualified by being made "local, that is to say, an acceptance to pay only at a particular specified place," adding that, "an acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there and not elsewhere."[58]

The precise effect of the Canadian statute may not be easy to determine. It simply states that an accept-

[57] 1 & 2 Geo. IV, cap. 78, sec. 1.
[58] *Bills of Exchange Act*, 1882, sec. 19 (2 c.)

ance to pay at a particular specified place is not conditional or qualified. It does not say that it might not be a qualified acceptance if the restrictive words were added and it was made payable there only and not elsewhere, but if such an acceptance were meant to be qualified, there would have been no good reason why that effect should not have been brought about by the use of the same words by which it is done in the English statute. This, however, is not a conclusive argument and the question must be considered open.

Can the acceptance be made payable in another town or country?—A further question is raised by Mr. Justice Maclaren,[59] whether the drawee can make the acceptance payable in a different town from that in which he resides or does business and which the drawer must have had in view when he drew the bill. The inconveniences that would result should such an acceptance be allowed are clearly pointed out by this writer. A holder in Toronto might be obliged to take an acceptance payable in Winnipeg, or even in another country, with no option of treating it as a dishonor of bill and with the obligation upon him of presenting it there for payment in order to hold the drawer and indorsers. The editing committee of the Journal of the Canadian Bankers' Association seems to assume that the acceptance can be made payable "at some unreasonably distant place, and they comment on the difficulties to which the provision might give rise," adding that "in practice, however, it works well enough, and it protects banks against the discharge of prior parties, which might result, but for this provision, through taking an acceptance, naming a different place for payment from that specified by the drawer."* Perhaps, notwithstanding this, it is better to consider the question an open one.

Can acceptor change the place of payment named in bill? Would this be a qualified acceptance?—The statute making the acceptance to pay at a particular place a general acceptance is not in terms confined to the case where no place of payment is named in the bill, but Mr.

[59] *Maclaren on B. & N.*, 3rd. Ed., p. 104-105. *J. C. B. 346.

Justice Maclaren takes it for granted that it is so confined and that where a place of payment is named in the bill an acceptance making the bill payable at a different place would be a qualified acceptance notwithstanding the terms of statute.[60] The editing committee of the Bankers' Journal evidently take a different view as will be seen on perusal of the quotation in the next preceding note.

Bill should be presented at place named in acceptance.—The acceptance to pay at a particular place not being a qualified acceptance, it would have followed had no further change in the law been made that the bill need not be presented for payment at the place so named in the acceptance. In fact the mode in which the judges who held such an acceptance to be general in "Rowe v. Young,"[61] arrived at their conclusion was that of disregarding the words of limitation as to place and treating them as superfluous. The statute does not sanction this view but provides expressly for presentment of the bill at the place specified in the acceptance. Section 88.

See, as to consequences of not presenting, comments under section 93.

Post-dated or Ante-dated acceptance.—The Journal of the Canadian Bankers' Association deals with the case of a post-dated acceptance of a draft payable after sight, saying that the acceptor is only bound to pay according to the tenor of his acceptance, referring to section 54 of the act, now section 128.[a] But it is pointed out that the drawers and indorsers in such a case would be discharged, the holder having taken an acceptance which varied the effect of the bill as drawn.

The Journal also deals[a] with the case of an ante-dated acceptance of a draft, payable after sight, saying there can be no room for doubt that such an acceptance is a qualified acceptance, which discharges the prior parties. "An order to pay at sight would not, it seems to us, be complied with if the acceptor undertook to pay the amount at some other time; and we think the holder

[60] *Maclaren* on Bills 3rd. Ed., p. 105.
[61] 2 Bro. & B., 165.
[a] 3 J. C. B., 302.

should refuse such an acceptance. If it were proper for a drawee to antedate his acceptance a single day, there is no logical reason why he should not antedate it a month or two months, and in the case of a draft drawn say at sixty days after sight, he might make the acceptance mature immediately, a most decided variation of the terms of the bill." It is obvious that in such a case, if an ante-dated acceptance could be taken, the contract of the drawer and indorser would be materially altered without their consent. They are for this reason discharged by the holder taking such an acceptance without their consent, instead of treating it as a dishonor of the bill.

Acceptance payable at a bank. Right and duty of bank to pay.—The question is asked in the Journal of the Canadian Bankers' Association, "can a bank legally charge at maturity to the account of a depositor having funds, an acceptance drawn on him, and accepted and made payable at the bank, without a cheque or a special authorization to do so; and secondly, could the depositor hold the bank responsible for any costs or damages arising from the bank omitting or refusing to charge the acceptance to his account without a cheque or authorization?" The answer given is that "in Ontario and other provinces which are under the same law, a bank may charge such an acceptance to the customer's account. In Quebec, it has been usually held that, without special authority, a bank is not entitled to charge such an acceptance to the customer, but, if it is a holder of the same at maturity, as its own property, the right of compensation or set-off entitles it to charge it against the customer's funds. We are not aware that the right of a bank to charge at maturity a note of which it is not the holder has ever been settled in any case that has come up in the province of Quebec; but we should think it possible that it would form a sufficient answer to any customer contesting the charging of a note to his account, that the bank had on the day of its maturity paid value for it, and thereby became a holder with right of set-off or compensation. In practice, however, it would not be wise to take the risk."

[b] 4 J. C. B., 313.

As to the question whether the bank could be held responsible for not charging up the acceptance, that is, in other words, whether it is the duty of the bank, having funds of the acceptor, to pay the acceptance and not suffer it to be dishonored, the answer is that "whether or not a bank could be held responsible for damages for refusing to pay a customer's acceptance, would depend on the contract between the bank and the customer, which might be either express or implied from a practice with regard to the customer's account, of paying such acceptances. If such a contract existed, the bank would be liable, but not otherwise."

Other cases of qualified acceptance.—It results from the method of codification adopted that this list of qualified acceptances is not exhaustive. It is only an enactment in the form of a statute of what had already been decided by the courts. The principle underlying these decisions is that the acceptance must be "secundum tenorem et effectum billae," and the cases given are rather illustrations of the general principle than an attempt to state exhaustively all the modes in which the acceptance may be qualified. These are in fact almost the words of Lord Esher, M. R., in "Decroix et al. v. Meyer." [62] "I think it is true to say that in section 19 of the act the examples given of a qualified acceptance are not exhaustive, and that there might be other cases of qualified acceptances when the acceptance in express terms varied the effect of the bill as drawn." In the case from which these words are taken the drawee in a bill drawn by L. D. Flipo, payable to the order of L. D. Flipo," (the drawer), struck through the word "order" and accepted the bill "in favor of L. D. Flipo only, payable at the Alliance Bank, London."[63] By virtue of the Bills of Exchange Act this bill with the word "order" struck out had to be considered of the same effect as if the word had been allowed to remain in the bill. The word "order" is not now necessary to render the bill negotiable. But for this amendment of the law the case

[62] 25 Q. B. D., at p. 348.

[63] Note that in the House of Lords it was treated as doubtful whether it was the drawees who had struck out the word "order". 1891, A. C., at 526 and 528.

would have been more difficult than it was, but, even in view of the amendment, it was one of no little difficulty. The acceptor certainly intended to qualify his acceptance and to make the money expressed in the bill payable to L. D. Flipo only, and not to any indorsee of the bill. But the court held that the acceptance must be construed most strongly against the acceptor. Had the words of acceptance been, "payable to L. D. Flipo only," possibly it would have been a qualified acceptance. Lord Esher held that the acceptance was susceptible of another meaning. "It seems to me that the meaning is merely that the acceptance is of a bill of which Flipo is the only drawer." The other judges agreed that the language of the acceptance was ambiguous, although they were not so successful as Lord Esher in suggesting any other possible meaning than the obvious one intended by the acceptor. Being ambiguous, the acceptance must be construed most strongly against the acceptor, and, although that is not suggested, in favor of the regularity of acceptance, and, therefore, it was the general acceptance of a bill which had not ceased to be negotiable by the mere elision of the words, "or order," which are now no longer requisite to the negotiability of a bill.

In the House of Lords a distinction was drawn in this case between what appears in the body of the acceptance and words written as they were in this case above the acceptance, and it was conceded by Lord Herschell that if the words used had been in the body of the acceptance they might have amounted to the qualification contended for.[64] It was considered that in the form in which the words appeared on the blli, a facsimile of which was produced, the holder taking the acceptance would not understand that it was qualified, and Halsbury, L. C., said: "I am happy to think that the decision in this case involves nothing more than the proposition that if a person writes across a bill that which unqualified would, in ordinary course ,import a clean acceptance of a bill, and intends to qualify its operation, he must do so by plain and intelligible language, and make that qualification sufficiently part of the acceptance itself to be intelligible in the ordinary course of business. If any

[64] 1891, A. C., 528.

other principle were laid down I think it would be fatal to the convenience of trade and the conduct of mercantile affairs, which demand for their transaction convenient and compendious forms, to which the law merchant has attached a definite meaning. Such ambiguous and inappropriate language as is sought to make here a qualification of an ordinary mercantile instrument would defeat the very object which mercantile instruments are intended to effect."[65]

Every contract on bill requires delivery save that acceptance is completed by a notification without delivery.

39. Every contract on a bill, whether it is the drawer's, the acceptor's or an endorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto: Provided, that where an acceptance is written on a bill, and the drawee gives notice to, or according to the directions of, the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable. 53 V., c. 33, s. 21. [E. s. 21.]

Cancellation of acceptance before delivery of communication.—Mr. Ames states the principle as to acceptance to be that it is complete without delivery.[66] An indorsement, as we have seen, is incomplete until completed by delivery. The reason for this distinction between acceptance and indorsement is well stated by Mr. Ames to be that the delivery of the bill or note is necessary only for the purpose of transferring title; an acceptance has no effect upon the title and is therefore complete the moment it is written on the bill "animo contrahendi." He adds: "Consistently with this view a subsequent cancellation before delivery would be nugatory, and it is considered that the opinion of Lord Ellenborough to this effect in "Bentinck v. Dorner" and "Thornton v. Dick," is more in accordance with the custom of merchants than the case of "Cox v. Troy," which over-ruled that opinion." The opinion here expressed by Mr. Ames does not seem to be logical. Acceptance is a contract; it is difficult to see why it should not like any other expression of intention

[65] See the powerful dissenting opinion of Lord Bramwell at p. 526 of 1891. A. C.

[66] 2 *Ames Cases on B. & N.*, 790.

to contract, be revocable until communicated to the other party to the contract. There is, of course, room for the contention that a party who writes his acceptance on a bill and afterwards cancels it should be held to have done an actionable wrong in mutilating the property of the holder, but there does not seem to be any good reason for holding him liable in contract when his intention has not been communicated. Hence, the dictum of the Privy Council in the "Bank of Van Dieman's Land v. Victoria Bank,"[67] (1871), seems to be as sound in principle as it is conclusive as an authority. There, a bill was left with the drawee for acceptance, and the drawee wrote an acceptance on it. The next day the holder called for the bill and was informed that it had been mislaid; he was requested to call following day, but in the meantime the drawee heard that the drawer had failed. He accordingly cancelled his acceptance and next day delivered the dishonored bill back to the holder. Here the "animus contrahendi" was undoubted, but as it had not been communicated the acceptance was not complete. In accordance with this case, the act declares that, "the expression 'acceptance,' means an acceptance completed by delivery or notification,"[68] and further, after stating in general terms that every contract on a bill is revocable until delivery of the instrument, qualifies this declaration by the above proviso, "that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill, that he has accepted it the acceptance then becomes irrevocable."

[67] L. R., 3 C. P., 526.
[68] Sec. 2 (a).

Delivery.

As between immediate parties.

40. As between immediate parties, and as regards a remote party, other than a holder in in due course, the delivery,—

Delivery must be by or under authority of party:

(a) in order to be effectual must be made either by or under the authority of the party drawing, accepting or endorsing, as the case may be;

May be shown to have been conditional.

(b) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the proprty in the bill.

If in hands of holder in due course valid delivery by prior pa[redacted]clusively presumed.

(2) If the bill is in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him, so as to make them liable to him, is conclusively presumed. 53 V., c. 33, s. 21. [E. s. 21.]

Where no longer in hands of party signing delivery is presumed valid and unconditional.

41. Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor or endorser, a valid and unconditional delivery by him is presumed until the contrary is proved. 53 V., c. 33, s. 21. [E. s. 21.]

Delivery as an escrow.—Mr. Daniel says* that a bill or note as well as a deed may be delivered as an escrow,—that is, delivered to a third party, (but not to the payee), to hold until a certain event happens or certain conditions are complied with and then the liability of the party commences as soon as the event happens or the conditions are fulfilled, without actual delivery by the depositary to the promisee. And it matters not that the actual delivery is not designed to take place until after the death of the promisor; the instrument, whether negotiable or otherwise, is nevertheless valid. Only American cases are cited for this statement. Compare note under subsection 2 h, and mark the distinction. The case of "Bromage v. Lloyd," there referred to,† was not the case of delivery as an escrow. There was no delivery at all until after the death of the payee who had written his name on

* *Daniel on Neg. Inst.* 5th Ed , p. 87.

† Ante page 11.

the back, and it was held that the executor could not, by merely delivering the instrument in that condition, complete the act of indorsement.

Can a bill be delivered in escrow to the payee himself?—Mr. Ames says[69] that a bill or note, like a bond, cannot be delivered to the payee as an escrow, agreeing with the statement of Mr. Daniel quoted in the next preceding paragraph, but he cites a number of American cases as being to the contrary. The only English case he refers to is "Bell v. Ingestre,"[70] (1848), in which it appeared that one Edwards was indebt[illegible] the banking company for which the plaintiff was [illegible] procured the defendant's acceptance [illegible] bills [illegible] question, had transmitted them to [illegible] with [illegible] name indorsed for the express [illegible] overdue bills and on the expre[illegible] mentioned bills should be [illegible] condition had never been complied with [illegible] Denman said it was a singular act of escrow, for the bills were delivered to the parties who, in the event of [illegible] performing a certain act, were to be benefited by them. "But still, I think they were delivered to them as mere trustees and that the same principle applies." Coleridge, J., said: "If there had been in this case the intervention of a third party as agent between the transferror of the bills and the transferees, for the purpose of handing the bills over on performance of the condition, there would have been no difficulty. But in principle it is the same thing, for, until the condition was performed, no interest was to pass to the transferees." The two other judges put their decision on the ground that there was no indorsement, because there was no delivery with the intent to transfer an interest, and that this fact was put in issue by a plea traversing the indorsement.

This case seems to show that, even before the passing of the act, there was no difficulty about the delivery to the transferee subject to a condition upon which the beneficial right of the transferee was suspended, and it would be difficult to distinguish the case of a delivery to the

[69] 2 *Ames Cases on B. & N.*, 833.
[70] 12 Q. B., 317.

payee immediately in the same way. Mr. Daniel discusses this question,[71] citing a case in the Court of Appeals of New York and a case in the Supreme Court of the United States, in the latter of which it was held, in an action by the payee against the maker of a note, that evidence was admissible to show a parol agreement between them and at the time of making the note that it should not become operative as a note until the maker could examine the property for which the note was given and determine whether he would take it. The question here raised touches, in one aspect of it, one of the most difficult branches of the law of evidence, that is the distinction between varying or contradicting by oral evidence the terms of a written contract,—which a bill or note is,—and showing by oral evidence that the document never came into existence as a contract. Mr. Daniel, referring to this class of cases in another place, suggests that " unless the non-fulfilment of the condition goes to the failure of consideration this would seem to trench upon fixed principles of law."[72] But it is not certain that this suggestion is well founded.. Doubtless the evidence of such a condition suspending the coming into existence of the contract is of a dangerous class, but it is not contrary to fixed principles of law. See Anson on Contracts, 10th ed., p. 278-279, and the case of " Pym v. Campbell,"[73] The point is also brought out in Mr. Paget's Gilbart lecture, quoted on a previous page.[74]

No new delivery required on happening of condition.—No further delivery is necessary upon the happening of the event on which the transfer of property in the bill is conditioned. It has already been delivered. Unlike the case of a bill in blank, which, except as against a holder in due course, is void if filled up after the death of the party giving authority to supply the blank, the death of the party who has delivered the bill subject to a condition does not prevent it from taking effect after the condition has been fulfilled.[74a]

[71] 1 *Daniel on Neg. Inst.*, 5th Ed., p. 87
[72] 1 *Daniel on Neg. Inst*, 5th Ed., p. 86.
[73] 6 E. & B., 370 (1856).
[74] Ante p. 41.
[74a] See 1 *Daniel on Neg. Inst.* 5th Ed. 87.

Holder in due course. Presumption of valid delivery conclusive.—The position of the holder in due course of a bill delivered conditionally is due to its quality as a negotiable instrument. The holder in due course is defined in section 56 to be one who has taken a bill complete and regular on the face of it before it is overdue in good faith and for value, without notice that it has been previously dishonored, if such was the fact, and without notice of any defect in the title of the person who negotiated it. Such a holder is not bound by the condition which would make the bill in the hands of a previous holder "a mere paper writing," and not a valid bill at all, "Chandler v. Beckwith,"[75] (1838.)

Presumption of unconditional delivery where bill not in possession of signer.—The result of section 41 and the previous section is, that in every case where the bill is no longer in the possession of a party who has signed it as drawer, acceptor or indorser it is presumed that there has been a valid and unconditional delivery by him. But this presumption may be rebutted by proof to the contrary, unless the bill has come into the hands of a holder in due course, in which case the presumption of a valid delivery of the bill by all parties prior to him, so as to make them liable to him, is conclusive and irrebuttable.

Computation of Time, Non-juridical Days and Days of Grace.

Days of grace allowed on bills not payable on demand when last day falls on holiday bill payable on following day.

42. Where a bill is not payable on demand, three days, called days of grace, are in every case, where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace: Provided that whenever the last day of grace falls on a legal holiday or non-juridical day in the province where any such bill is payable, then the day next following, not being a legal holiday or non-juridical day in such province, shall be the last day of grace. 53 V., c. 33, s. 14. [E. s. 14.]

[75] 2 N. B. R., per *Chipman*, C. J., at 428.

Grace on sight drafts.—It does not seem to have been clearly settled whether days of grace were allowed on sight drafts in England before the Bills of Exchange Act. It was held in "Coleman v. Sayer,"[76] (1728), that they were allowed on such bills, but more than a hundred years later in "Dixon v Nuttall,"[77] (1834), Parke, B., said it was not necessary to say whether days of grace were to be allowed or not on a note by which the maker promised to pay M. A. D., or bearer, on demand, the sum of sixteen pounds at sight, &c., although it was held that the maker was entitled to presentment for payment before action, as he would not have been if it had been held that the note was the ordinary note payable on demand.

In England, no days of grace are now allowed on sight drafts. The law is otherwise in Canada, as will be seen in the next following note.

Classification of instruments on which grace is and is not allowed.—In this country days of grace are allowed on the following bills: —

1. Those payable at a fixed period after date.
2. Those payable at sight.
3. Those payable at a fixed period after sight.
4. Those payable on the occurrence of a specified event which is certain to happen.
5. Those payable at a fixed period after the occurrence of such an event.

Those on which no days of grace are allowed are as follows:—

1. Those expressed to be payable on demand.
2. Those expressed to be payable on presentation.
3. Those in which no date of payment is expressed.
4. Those accepted or indorsed after maturity.
5. Those in which it is expressly provided that no days of grace are to be allowed.

Grace on bill payable by instalments.—Where a bill is made payable by instalments, days of grace are allowed on each of the instalments. Ante p. 109.

[76] *Barnardiston*, 303.
[77] 1 C. M. & R., 307.

Grace where date of time draft altered.—Where the date of a bill drawn payable a specified time after date has been altered by mutual consent the days of grace must be added to the time as fixed by the new date.

At sight with one day's grace.—A draft is drawn "at sight with one days grace." This becomes due the day after acceptance. The statute in terms provides for three days of grace only where the bill does not otherwise provide. If the bill had provided that there should be no grace it would have been due on the date of the acceptance.[78]

Accepted to mature October 4th.—The editing committee of the Journal of the Canadian Bankers' Association[79] express the opinion that a bill thus accepted is due October 7th, according to the acceptance. "It cannot be said that it provides that there should be no days of grace, and under section 14 of Bills of Exchange Act," (section 42 of the present act), "three days are, in every case, to be added to the time of payment fixed by the bill, unless the bill itself should otherwise provide."

Computation of due date: two successive holidays.—In England where a bill falls due on a "dies non," it is payable on the previous day, unless there are two holidays in succession, in which case those falling due on the first holiday are payable the day before the holidays, and those falling due on the second holiday are payable the day after. The effect of this is to divide the work of the banker and not allow two days' work to accumulate. Convenience seems to favor the English rule, but it has not been adopted here.

Grace determined by law of the place of payment.—Whether days of grace are to be allowed or not is a question to be determined by the "lex loci solutionis." This is the general priciple International law and is affirmed in section 164, which enacts that where a bill is drawn in one country and is payable in another, the due date

[78] 6 J. C. B., 306.
[79] 10 J. C. B., p. 56 of October number.

thereof is determined according to the law of the place where it is payable.

Due date is last day of grace, but no right of action till following day.—The bill is due and payable on the last day of grace, but it does not follow that an action can be brought on that day. "It seems," says Lindley, L. J., in "Kennedy v. Thomas,"[80] (1894), "a little paradoxical that a bill of exchange should be treated as dishonored for one purpose and not for another, but it is clear that when payment of a bill is refused upon its presentation at any time during the day on which it falls due the holder has an immediate right of recourse against the drawer and indorsers. He can at once give notice of dishonor to the drawer and the indorsers, but he is not entitled to commence an action against them any more than against the acceptor before the expiration of the last day of grace.

43. **In all matters relating to bills of exchange, the following and no other days shall be observed as legal holidays or non-juridical days:—**

Legal holidays enumerated.

Sundays;

(a) In all the Provinces of Canada,

New Year's Day;

Good Friday;

Easter Monday;

Victoria Day;

Dominion Day;

Labour Day;

Christmas day;

Kings birthday.

The birthday (or the day fixed by proclamation for the celebration of the birthday) of the reigning sovereign;

General Fast or Thanksgiving.

Any day appointed by proclamation for a public holiday, or for a general fast, or a general thanksgiving throughout Canada.

The day next following New Year's Day, Christmas Day, Victoria Day, Dominion Day, and the birthday of the reigning sovereign when such days respectively fall on Sunday;

[80] 1894, 2 Q. B., at 762.

Special days in Quebec.

(b) In the Province of Quebec in addition to the said days,
The Epiphany;
The Ascension;
All Saint's Day;
Conception Day;

Provincial Fast day or Thanksgiving day and other provincial holidays.

(c) In any one of the Provinces of Canada, any day appointed by proclamation of the Lieutenant-Governor of such province for a public holiday, or for a fast or thanksgiving within the same, and any non-juridical day by virtue of a statute of such province. 53 V., c. 33, s. 14; 56 V., c. 30, s. 1; 57-58 V., c. 55, s. 2; 1 E. VII., c. 12, ss. 2 and 4. [Cf. E. ss. 14 and 92.]

Bank holidays, other than those enumerated.—Questions have arisen as to the observance by banks of holidays other than those enumerated in the act. In the Journal of the Canadian Bankers' Association the question is asked, what holidays a bank may observe, and what would be the consequence if a bank closed at 12 o'clock and some private holder of a bill due that day, or of a cheque, should present it after the bank had closed, and it were thereby dishonored. The answer given is that banks in Canada may legally observe any holiday they choose to keep, provided that in closing up their offices they are not breaking their contract with their customers, which may be either expressed or implied. The discussion has reference rather to the responsibility of the banker than to the subject of bills and notes. It is more fully dealt with in the Journal of the Canadian Bankers' Association, in volume 7, at page 165. See also vol. 5, p. 154.

Method of computing time.

44. Where a bill is payable at sight, or at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment. 53 V., c. 33, s. 14. [Cf. E. s. 14.]

Illustration.—A bill is drawn or a note made January 3rd, at twenty days. Excluding the third day of the month, twenty days will carry to the twenty-third, which would be the day of payment but for the provision for days of grace. Adding these the day of payment is January 26th. This section does not fix the point at which the time begins to run. That is provided for in the next following section. Neither is the rule here prescribed applicable to a period of time fixed by months. That is regulated by section 46

Time on sight draft runs from acceptance or protest for non-acceptance.

45. Where a bill is payable at sight or at a fixed period after sight, the time begins to run from the date of the acceptance if the bill is accepted, and from the date of noting or protest if the bill is noted or protested for non-acceptance, or for non-delivery. 53 V., c. 33, s. 14. [Cf. E. s. 14.]

When must draft be accepted?—Section 80 provides that a bill may be accepted by the drawee on the day of its due presentment, or at any time within two days thereafter, that is, on the next day or the day following the next. In the case of a bill payable at sight or after sight, these two days, if allowed to the drawee, would lengthen by so much his time for paying, but the opinion was emphatically expressed and will be found in several places in the Journal of the Canadian Bankers' Association,[61] that the drawee was not entitled to the benefit of these two days but must date his acceptance as of the time when the bill was presented. The law was amended in 1902 by the enactment of a clause which is now section 80, sub-section 4 of which provides that in the case of a bill payable at sight or after sight, the acceptor may date his acceptance as of any of the days aforesaid, that is, on the day of its presentment or either of the two days thereafter, but not later than the day of his actual acceptance. The day so fixed is the day from which the three days grace begins to run. Thus, if a sight bill is presented on January 3rd, the drawee may accept on the third, fourth or fifth, and in the latter case the bill will be

[61] See 6 J. C. B., 310; 7 J. C. B., 286; 9 J. C. B., 73.

due on the eighth, and is then dishonored if not paid, though action cannot be brought until the following day.

When bill must be protested for non-acceptance.—The bill need not be noted or protested for non-acceptance, even in the case of a bill requiring protest in order to charge the drawer or indorsers, merely because it is not accepted on the day of presentation for acceptance, but if it is not accepted within two days after presentation it must be treated as dishonored by non-acceptance. Otherwise the holder loses his recourse against the drawer and indorsers, under section 80 as amended by 2 Edw. VII. Protest for non-delivery is made when the drawee detains it without accepting it. Where a bill payable after sight is accepted for honor its maturity is calculated from the date of protesting for non-acceptance, and not from the date of acceptance for honor. Section 150.

Bill payable at a month or months after date.

46. Every bill which is made payable at a month or months after date becomes due on the same numbered day of the month in which it is made payable as the day on which it is dated, unless there is no such day in the month in which it is made payable, in which case it becomes due on the last day of that month, with the addition, in all cases, of the days of grace.

"Month" means calendar month.

(2) The term "month" in a bill means the calendar month. 53 V., c. 33, s. 14. [Cf. E. s. 14.]

Illustration.—A bill dated January 28th, 29th, 30th or 31st, at one month would be due Februay 28th, with three days grace added, the due date thus being March 3rd, in all the four cases. In leap year the first mentioned bill would become due March 2nd, and all the others on March 3rd. The addition in all cases of days of grace, it goes without saying, means all cases in which days of grace are allowed.

CAPACITY AND AUTHORITY OF PARTIES.

Capacity to contract as to bill co-extensive with general capacity proviso as to corporation.

47. Capacity to incur liability as a party to a bill is co-extensive with capacity to contract: Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor or endorser, of a bill, unless it is competent to it so to do under the law for the time being in force relating to such corporation. 53 V., c. 33, s. 22. [E. s. 22.]

Mode of signing.—A note on the general subject of signing a note or bill by a corporation will be found on page .

Endorsement of infant or a corporation not having capacity transfers the title without incurring obligation.

48. Where a bill is drawn or endorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or endorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto. 53 V., c. 33, s. 22. [E. s. 22.]

General discussion of contractual capacity not attempted.—For a full discussion of the subject of capacity to contract the reader will naturally look to a work on the law of contracts, or with reference to the two cases specially referred to in the foregoing sections, to works on Infants and Corporations. No attempt will be made in this place to do more than state the general principles governing the matter and those exceptional provisions which have been made applicable to bills of exchange and promissory notes.

Capacity of corporation to sign bills and notes.—The statement in the act respecting the capacity of a corporation to incur liability on a bill comes properly in the form of a proviso, inasmuch as the capacity of a corporation to incur liability on a bill is not co-extensive with its capacity to contract. Its capacity to contract generally is determined by the purposes for which it is constituted a corporation. Its contracts made within the range of those purposes are valid, but it does not follow that it

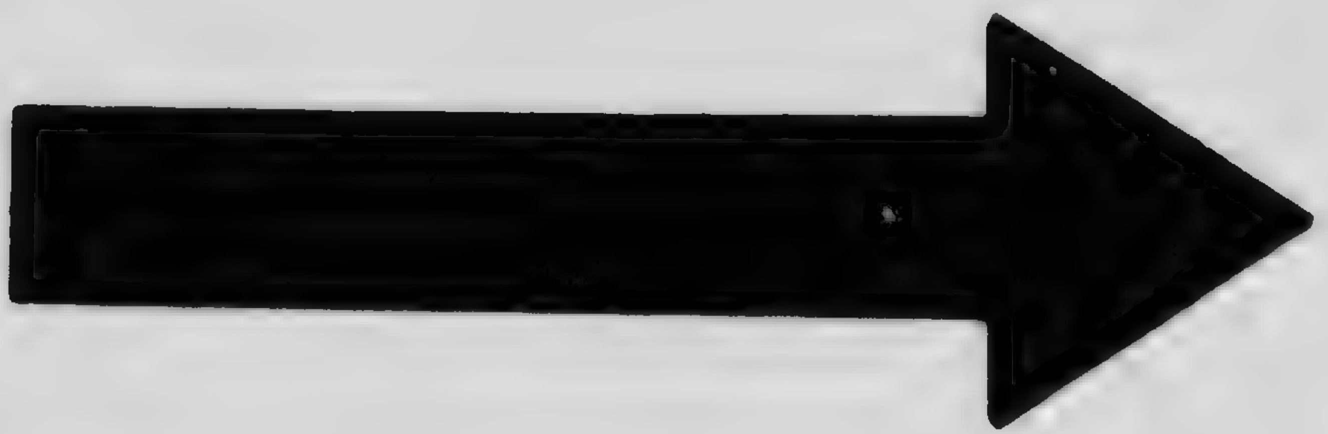
can accept bills or sign promissory notes in connection with such purposes. In "Bateman v. Midwales Railway Co.",[82] the court was required to decide upon the validity of a bill of exchange accepted by a company incorporated for the purpose of making a railway, and Erle, C. J., holding that the company could not accept a bill, said: "The bill of exchange is a cause of action, a contract by itself, which binds the acceptor in the hands of any indorsee for value, and I consider it would be altogether contrary to the principles of the law which regulate such instruments that they should be valid or not according as the consideration between the original parties was good or bad, or whether, in the case of a corporation, the consideration in respect of which the acceptance is given is sufficiently connected with the purpose for which the acceptors are incorporated."[83] Byles, J., said that there were only three instances that could be cited of the acceptance of negotiable instruments by a corporation; first, that of the Bank of England, which was incorporated for that very purpose; secondly, that of the East India Company as to which the authority, if not created, was at least ratified and confirmed by two acts of Parliament; and, thirdly, that of a particular company which had express authority given to it to accept bills. This enumeration was made in 1866. In the following year occurred the case of the "Peruvian Railways Company,"[84] where the Court of Appeal subscribed to everything that had been said in the former case, but held that bills of exchange accepted by the company in favor of another company from which they had purchased concessions and which had undertaken to construct a railway for them were valid and binding on the company. The bills were in the hands of an indorsee for value and it was contended that, in view of the state of accounts between the payees and the acceptors, the bills were accommodation bills. It was not decided that the company would be liable if it could be shown that the indorsees knew that the bills were given without value. On the contrary, it was suggested by Lord Cairns that this might be notice to the indorsees of that which would be a

[82] L. R., 1 C. P., 499 (1866).
[83] Ib., at p. 509.
[84] L. R., 2 Ch., 617 (1867)

fraud upon the shareholders of the Company in whose name the bills had been accepted. But, on the main question, as to the capacity of the company to become liable on the bills, it was held, first, that the Companies' Act, 1862, did not, as the court below had decided, confer on every company registered under it the power to accept bills of exchange, but that such a power did exist where, and only where, upon a fair construction of the memorandum and articles of association, it appeared that it was intended to be conferred. In the present case it was held that the power was conferred by the general words of a memorandum stating that, in order to attain their main object, which was the purchasing of a concession from a foreign government for the construction of a railway and the forming of a "societe anonyme" to build the railway, the company might do in England, Peru or elsewhere whatever they thought incidental or conducive thereto, and by the articles which gave the directors power to do all things and make all contracts which, in their judgment, were necessary and proper for the purpose of carrying into effect the object named in the memorandum. The memorandum, under the English Companies' Act, defines the purposes of the company, while the articles of association define the duties, rights and powers of the governing body as between themselves and the company at large and the mode and form in which the business of the company is carried on. Lord Cairns, in this case, drew his inferences as to the powers of the company from the memorandum and consulted the articles solely for the purpose of ascertaining how the power should be exercised. Where a company is incorporated by act of parliament or by the legislature, the purposes of the incorporation are always stated, or should be, in the incorporating act, and the power of the company to accept bills or make promissory notes must depend upon the purposes so stated. The Companies Act, chapter 79 of the Revised Statutes, contains a section in identical terms providing that every contract, agreement or bargain made and every bill of exchange, drawn, accepted or indorsed, and every promissory note and cheque made, drawn or indorsed on behalf of the company by any agent, officer or servant of the company in general accordance with his powers as such under the

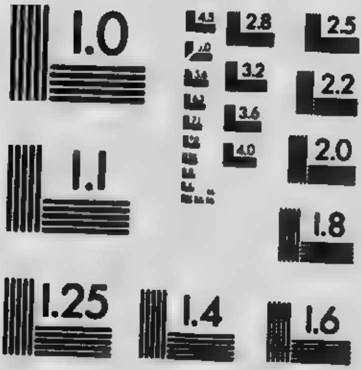
by-laws of the company shall be binding upon the company, and in no case shall it be necessary to have the seal of the company affixed to any such contract, agreement or bargain, bill of exchange, promissory note or cheque, or to prove that the same was made, drawn, accepted or indorsed as the case may be in pursuance of any by-law, or special vote or order, and the person so acting as agent, officer or servant of the company shall not be thereby subjected individually to any liability whatsoever to any third person, (provided that no note is to be issued payable to bearer nor any note intended to circulate as money, or as the note of a bank, nor shall the company engage in the business of banking or insurance.)

This statute was not passed for the purpose of defining the cases in which it should be within the power of the company to incur liability on bills of exchange and promissory notes, but merely to point out the manner in which the liability should be created where the capacity can be inferred from the purposes of the company. It is still as necessary as it ever was to determine the prior question, whether the issuing of a negotiable instrument is within the power of the company. This power "depends upon the nature of the company," but since the judgment of Lord Cairns in the Peruvian Railway case, the power seems less limited than it was before the decision in that case. The test applied by Lindley, J., in his work on companies certainly was not the test applied by Lord Cairns in the case referred to. Judge Lindley would only allow the company to issue bills or notes if its business is such that it cannot be carried on in the ordinary way without the use of bills, &c. Lord Cairns held the acceptance valid in the case referred to because the company might properly "think it incidental or conducive" to the acquirement of the concessions for the purpose of acquiring which it was incorporated, to give its acceptances in payment for the concessions. Previously to this case it had been decided that the power did not exist in the case of a salvage company, a mining company, a gas company, a washing company, a salt and alkali company, a water-works company, a cemetery company, or a railway company. It must, however, be noted that Lord Cairns found the power to accept bills expressed in the words defining the powers of the com-



MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



pany. But on the other hand, those words were of a very general nature and effect could have been given to them without holding that they conferred upon the company the power to accept bills. The decision seems, therefore, to indicate a tendency to enlarge the capacity of corporations in this direction.

Same subject. A Trading Corporation.—Judge Chalsays[85] that in the case of a trading corporation the fact of incorporation for the purposes of trade would give capacity. In the case of non-trading corporations the power must be expressly given, or there must be terms in the charter wide enough to include it. The various companies and corporations mentioned in the preceding note, have, according to Judge Chalmers' interpretation of the cases been held to be non-trading corporations.

Infants' contracts relating to bills and notes.—The clause under consideration enacts that capacity to incur liability on a bill is co-extensive with capacity to contract. An infant has no general capacity to contract and, therefore, has no capacity to become liable on a bill of exchange. But an infant it is said can make a valid contract for necessaries, and, if so, it should follow that his acceptance or promissory note given for necessaries is binding. Such, however, is not the case. It should, according to the provisions of this section, be the case if the obligation of the infant for necessaries arises out of a contract, but it may be suggested that the obligation does not rest on the true contract at all. It is a case of "quasi" contract. If that solution is accepted the statement in the text may be accepted without qualification and be harmonized with the principle that the infant's bill or note, even though given for necessaries, is, like his other contracts, voidable at his option. It may, like his other contracts be ratified upon his coming of age, but wherever the Mercantile Law Amendment Act is in force this ratification to be effective must be in writing.

Ratification after majority attained.—The promissory note made or bill of exchange accepted after attainment

[85] *Chalmers on Bills*, 6th Ed., 65.

of majority for a debt incurred during minority rests on a different footing altogether. It is not the contract of an infant. It is the promise of a person "sui juris," and the only question that can be asked is whether there is consideration for it.

Idiots, lunatics and drunken persons.—The law as to idiots, lunatics and drunken persons has been tolerably well settled by the cases of "Molton v. Camroux,"[86] (1849), and "Matthews v. Baxter,"[87] (1873), to the effect stated by Sir Frederick Pollock, that a contract made by a person who is drunk or of unsound mind so as to be incapable of understanding its effect is voidable at that person's option, unless the other contracting party did not believe and had not reasonable cause to believe that he was drunk or of unsound mind. If the other party did not believe and did not have reasonable cause for believing that he was drunk or of unsound mind, the contract is not even voidable at the option of the drunken person or lunatic. It is valid and binding.

Effect of indorsement by infant or corporation having no capacity to incur liability on a bill.—Chalmers says it is not uncommon in the United States to get a bill made payable to the order of an infant clerk whose indorsement under the principle empodied in this section operates as an indorsement without recourse and yet does not discredit the bill.

Effect of indorsement in firm name by member of non-trading firm.—Where one of the members of a non-trading partnership indorses in the firm name a bill payable to the partnership the principle of this section applies. The title passes to the indorsee although the firm cannot be sued on the indorsement. The partner so signing is, however, liable on his indorsement in such a case.

Drawing or indorsement by married woman.—Mr. Justice Maclaren notices that married women are not included in this section among those persons whose

[86] 2 Exch., 487; 4 Exch., 17 1849.
[87] L. R., 8 Exch., 132.

drawing or indorsement of a bill entitles the holder to enforce it against all parties other than the one so incapacitated. The position of the holder of a bill drawn by a married woman having no capacity for such an act, would depend upon the principles of estoppel. The acceptor would be precluded from denying to a holder in due course her capacity or authority to draw the bill[88] and the indorser would be precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, or that he had then a good title thereto. The holder in due course would, therefore, have a good title to the bill and a right to enforce it just as if the married woman had been included among the classes mentioned in the section. Where the bill was not drawn but indorsed by a married woman who was the payee, the acceptor would be equally precluded from denying to a holder in due course the capacity of the payee, although a married woman, to indorse the bill. The indorser of such a bill would also be precluded from denying to his immediate or any subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill and that he had a good title thereto.

Where a note was made payable by the maker to the order of his wife who indorsed it to the holder, it was held that he had impliedly authorized her to indorse it and confer title, and was estopped from denying his liability on the instrument to the holder, "McIver et al. v. Dennison,"[89] (1859.)

Forged signature is inoperative and confers no rights except by way of estoppel.

49. Subject to the provisions of this act, where a signature on a bill is forged, or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain

[88] Sec. 129 and 133.
[89] 18 U. C. Q. B., 619.

or enforce payment of the bill is precluded from setting up the forgery or want of authority: Provided that,—

This does not affect ratification of unauthorized signature.

(a) nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery;

Cheque paid on forged indorsement can be charged up unless drawer gives bank notice within year after acquiring knowledge.

(b) if a cheque payable to order is paid by the drawee upon a forged endorsement out of the funds of the drawer, or is so paid and charged to his account, the drawer shall have no right of action against the drawee for the recovery back of the amount so paid, nor any defence to any claim made by the drawee for the amount so paid, as the case may be, unless he gives notice in writing of such forgery to the drawee within one year after he has acquired notice of such forgery.

Failing such notice cheque held to have been paid in due course.

(2) In case of failure by the drawer to give such notice within the said period, such cheque shall be held to have been paid in due course as respects every other party thereto or named therein, who has not previously instituted proceedings for the protection of his right. 53 V., c. 33, s. 24. [Cf. E. S.]

50. If a bill bearing a forged or unauthorized endorsement is paid in good faith and in the ordinary course of business, by or on behalf of the drawee or acceptor, the person by whom or on whose behalf such payment is made shall have the right to recover the amount so paid from the person to whom it was so paid or from any endorser who has endorsed the bill subsequently to the forged or unauthoried endorsement if notice of the endorsement being a forged or unauthorzied endorsement is given to each such subsequent endorser within the time and in the manner in this section mentioned.

(2) Any such person or endorser from whom said amount has been recovered shall

have the like right of recovery against any prior endorser subsequent to the forged or unauthorized endorsement.

(3) Such notice of the endorsement being a forged or unauthorized endorsement shall be given within a reasonable time after the person seeking to recover the amount has acquired notice that the endorsement is forged or unauthorized, and may be given in the same manner, and if sent by post may be addressed in the same way, as notice of protest or dishonour of a bill may be given or addressed under this act. 60-61 V., c. 10, s. 1.

Contents of sections summarized.—These sections enact that subject to the rules as to estoppel yet to be explained and to the provisions as to crossed cheques, a forged or unauthorized signature is wholly inoperative, from which it follows that the holder under such a signature has no rights. But the statute provides, redundantly, that this shall not affect the position of a party who is precluded from setting up the fact that a signature has been forged or placed on the bill without authority.[1] Moreover, an unauthorized signature not amounting to forgery may be ratified and the statute does not interfere with such a ratification.[2]

If a cheque is paid upon a forged indorsement out of the drawer's funds, the drawer cannot recover back the amount or defend against the bank suing for the amount, as the case may be, unless he gives the bank written notice of the forgery within one year after having himself acquired the notice; and in case of failure to give such notice the cheque is held to have been paid in due course as respects every other party thereto or named therein who has not previously instituted proceedings for the protection of his rights.

If a bill bearing a forged or unauthorized indorsement is paid in good faith and in the ordinary course of business by or on behalf of the drawee or acceptor the latter may recover the amount so paid from the person to whom it

[1] See two next following notes.

[2] As to ratification of forged signature see note at a later page under this section.

was paid or from any indorser subsequent to the forged or unauthorized indorsement, if notice is given to such indorser in a reasonable time after the person so having paid has acquired notice of the forgery or want of authority, and any indorser paying under such compulsion has a like right against any prior indorser subsequent to the forged or unauthorized indorsement. The notices here referred to may be given in the same manner as a notice of protest or dishonour.

Short history of sections, and exposition of the differences between Canadian and Imperial Act as to forged signature.—The provisions of this act in reference to forged signatures differ from those of the Imperial Act. When the bill was introduced it was in the same terms as the English statute. The section numbered 49 ended with the words of the proviso that nothing therein should affect the ratification of an unauthorized signature not amounting to forgery, and a subsequent section in the same terms as section 60 of the Imperial Act provided that when a bill payable on demand was drawn on a bank and the bank on whom it was drawn paid it in good faith and in the ordinary course of business it should not be incumbent on the bank to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purported to be, and the bank was deemed to have paid the bill in due course although such indorsement had been forged or made without authority. The House of Commons declined to pass this section as it was thought that it would have materially changed the law of this country on the subject. Mr. Lash, K. C., counsel for the Canadian Bankers' Association, suggests that the action of the House probably resulted from a misunderstanding of the effect of the section.[2] The Senate, concurring in the view taken by the House of Commons, rejected a motion to restore the clause and added the words providing for the case of a cheque paid by the drawee on a forged indorsement out of the funds of the drawer or paid and charged to his account, and this amendment was accepted by the House of Commons, in lieu of the

[2] See 5 J. C. B., 25.

provisions of section 60 of the Imperial Act. In the following year, a prov so numbered sub-section 2 was added to the section in order to give the bank or any indorser who had paid the amount of a cheque bearing a forged indorsement the remedy therein provided for and which it was believed he would not otherwise have, against any indorser subsequent to the forged indorsement.[3] This provision remained on the statute book until 1897, when it was repealed and sub-sections numbered 2 and 3 were substituted for it. These sub-sections correspond to section 50 of the present act. A fuller history of these sections will be found in an article by Mr. Lash, K. C., in the Journal of the Canadian Bankers' Association.[4]

English precedents misleading.—The condition of the law is so very different under these sections from that produced by the English Bills of Exchange Act that English cases, if relied on, would be certain to mislead the reader. An instance of this occurs in Mr. Justice Maclaren's work. As an illustration of the section he puts a case in which the bill becomes due and is presented for payment. It is paid in good faith and the money received in good faith. The author then says that if such an interval has elapsed that the position of the holder may have been altered the money so paid cannot be recovered from the holder although the indorsements on the bill subsequently prove to be forgeries.[5] This seems to be the very opposite of what the statute says when it provides that if a bill bearing a forged or unauthorized indorsement is paid in good faith and in the ordinary course of business by or on behalf of the acceptor, the person by whom or on whose behalf such payment is made shall have the right to receive the amount so paid from the person to whom it was paid or from any indorser subsequent to the forged indorsement, provided reasonable notice of the forgery has been given to such indorser. All that this statute requires is that reasonably timely notice should be given of the forgery. The position of the holder may very easily have been altered in the meantime and will almost certainly have been

[3] 1891, cap. 17, sec. 4.
[4] 5 J. C B , 22.
[5] *Maclaren on Bills*, 3rd Ed., p. 145.

altered. If so, according to Mr. Justice Maclaren's illustration, it is too late to recover back the money paid. Under the statute it is clear that it can be recovered back.

The explanation is that the illustration given by Mr. Justice Maclaren is the English case of "London and River Plate Bank v. Bank of Liverpool,"[6] decided of course under English law. The case was sharply criticized by the Journal of the Canadian Bankers' Association,[7] and it would appear that it was the shock occasioned by this case that led to the amendment of the law by the section above quoted which is now numbered 50.[8]

Mr. Lash's interpretation of the sections.—After a clear statement of the history of the legislation, Mr. Lash, in the article already referred to, explains the operation of the new clause in the following language:[9] "It is framed so as to cover a bill simply, whether it be payable on demand, at or after sight, etc., and whether it be drawn on a bank or otherwise. Section 186 of the Bills of Exchange Act provides that, with certain specified exceptions, the provisions of the act relating to bills of exchange apply with the necessary modifications to promissory notes, and in applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill and the first endorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to the drawer's order. By section 165 a cheque is defined to be a bill of exchange drawn on a bank, payable on demand. The new section would therefore apply to a bill of exchange, a promissory note and a cheque. It is also framed to cover both a forged and unauthorized endorsement, and a payment to be recovered back must have been made in good faith and in the ordinary course of business. Section 3 of the Bills of Exchange Act declares that 'a thing is deemed 'to be done in good faith within the meaning of this act 'where it is in fact done honestly, whether it is done 'negligently or not.' In this connection it will be

[6] 1896, 1 Q. B., 7.
[7] 3 J. C. B., 304. See, however, a full discussion of this case by Mr. Paget, K. C., in 4 J. C. B., 210.
[8] See 5 J. C. B., at p. 25, last paragraph.
[9] 5 J. C. B., 27. (the new numbering of the sections has been inserted in the extract).

interesting to note that section 173, which affords protection to a bank paying a crossed cheque, requires that the payment should be made 'in good faith and without negligence.' The difference is important. The old section in terms conferred the right of recovery back upon the drawee only. The new section confers the right upon the person by whom or on whose behalf the payment is made. 'Person' under the Interpretation Act, includes 'corporation,' and, therefore, a bank. It is, of course, a common practice for customers to make their notes and acceptances payable at their bank, and the bank is justified in paying them out of funds at its customers' credit. In making such payment without the express approval of the customer in each case the bank certainly runs some risk of trouble with its customer, should it turn out that an endorsement has been forged or unauthorized; and, should the bank have paid the item and charged it to the customer's account overdrawn at the time its right under the old section to recover back the money from the endorser would have been very doubtful. The new section, however, makes the right clear, as it is given to the person by whom or on whose behalf the payment is made, so that the claim for repayment might be made either by the bank which made the payment or by its customer on whose behalf the payment was made. It will be observed that the old section gave the 'rights of a holder in due course' for the recovery back of the amount paid from any endorser. These rights, whatever they may have been, were not given as against the person who had received the money but who had not endorsed. The old section did, however, assume to give to the drawee 'his legal recourse against the drawer as transferrer by delivery,' but, as this 'legal recourse' was not defined, the section really did not advance the position of the drawee in this respect. The new section confers the right to recover back the amount from the person to whom it was paid, or from any endorser subsequent to the forged or unauthorized endorsement. Neither the old section nor the new section assumes to confer any rights against an intermediate holder who may have transferred the bill but who had not endorsed it. Notice of the forgery or unauthorized endorsement must be sent to each

endorser subsequent thereto within a reasonable time after the person seeking to recover the amount has acquired notice of the forged or unauthorized endorsement. It will be observed that the notice must be sent to each subsequent endorser, and not only to the endorser against whom the claim is intended to be made. It will also be observed that the notice must be given within a reasonable time after knowledge of the forgery, etc. It was thought better to leave the time indefinite in this way. It would be a question of fact for the tribunal to decide under the circumstances of the particular case, whether notice had been given within a reasonable time. If a fixed time were limited by the act, it might prove either too short or too long, and thus do injustice in particular cases.

"There are other provisions of the Bills of Exchange Act providing for things being done within a reasonable time, so that the principle is already established by the act; for instance: sub-section 2 of section 70 declares that a bill payable on demand is deemed to be overdue when it appears on the face of it to have been in circulation for an unreasonable length of time, what is an unreasonable length of time for this purpose being declared to be a question of fact. Sub-section (b) of section 86 declares that presentment of a bill payable on demand must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its endorsement in order to render the endorser liable, and the section declares that in determining what is a reasonable time regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case. A simliar provision is contained in section 77 with respect to presentation for acceptance or negotiation of a bill payable at or after sight. Section 83, sub-section 2, declares that when the drawer or endorser of a bill receives notice of qualified acceptance he must express his dissent to the holder within a reasonable time, &c.

"The new section also makes a definite provision with respect to the manner of giving notice, and adopts the provisions of the act with respect to notice of protest or dishonor.

"It will be observed that the enactment does not affect the rights or position of the drawer or endorsers prior to the forged or unauthorized endorsement, they being in no way responsible for the forgery or want of authority. As a loss must be suffered by some innocent party on account of the forgery, it is only right that the loss should fall upon him who by his negligence, want of caution or failure to enquire, was imposed on, and who had it entirely within his power to protect himself at the time of acquiring the bill. These remarks apply to the first endorser after the forged or unauthorized endorsement and to each subsequent endorser, but they do not apply to the acceptor, who has no option when the bill is presented for payment, but to pay it or let it go to protest; he has no time to make any enquiries about the endorsement, and in the majority of cases has no means of doing so even if he had time, and, if he acts in good faith and in the ordinary course of business in paying the bill, he above all others of the innocent parties should not suffer, provided that after acquiring knowledge of the forgery, etc., he acts promptly. It is, of course, out of the question to think that an acceptor would allow his bill to go to protest with all the consequent results upon his credit, etc., unless he was sure that the person presenting the bill had no title to it; he should only be required to act in good faith, and in the ordinary course of business. An acceptor must, when the bill is presented at the proper time, then and there either pay or decline to pay. In strict law he would not have any further time than was necessary to examine the bill itself and the endorsements on it."

Acceptor cannot set up forgery of drawer's signature.—If the party against whom it is sought to enforce payment of the bill is the acceptor, he cannot avail himself of the provisions of this section, against a holder in due course, on the ground of the forgery of the drawer's signature, because by his acceptance he is precluded from denying to such holder the existence of the drawer, the genuineness of his signature and his capacity and authority to draw the bill.[10] But the acceptor is not precluded from denying even to such a holder the genuineness of

[10] Section 129a.

the indorsement by the payee whether the payee be the drawer or some third party.

Indorser precluded from setting up forgery of drawer's signature or of previous indorser's.—If the party against whom it is sought to enforce the bill is an indorser, he is, in like manner, precluded from denying to the holder in due course the genuineness of the drawer's signature and of all indorsements previous to his own, and to this extent he also is unable to avail himself of the provisions of the section.[11] See also sections 173 and 175, as to crossed cheques and the comments thereunder which must be read in connection with these sections.

Ratification of unauthorized signature. Can a forgery be ratified?—The statute, while providing that an unauthorized or forged signature is inoperative and confers no rights, enacts in effect that this principle shall not apply when the unauthorized signature has been ratified, but it also seems to say that it shall apply in every case where the signature in question has been forged, and this under the theory that a forgery cannot be ratified. If it should turn out that a forgery can be ratified, how must the statute be read? Shall we have to say that even if it can be ratified, the effect of such a ratification is not saved, the signature is nevertheless inoperative because the only thing that is saved is the effect of an unauthorized signature which has been ratified and which does not amount to a forgery; or shall we say that, in so far as a forged signature may be ratified, in so far it may be effectual to prevent the consequences from following that are set out in the section; in other words, that if the forged signature is effectually ratified the bill becomes operative in the same manner as if the signature had been duly authorized. The question is important because it seems to be well settled by the case of "McKenzie v. British Linen Co."[12], that, although a forgery cannot be so ratified as to make a defence for the forger against a criminal charge, yet, if the person whose name was used without authority chooses to ratify the act, even though known to be a crime, he makes himself civilly responsible just

[11] Section 133*b*.
[12] 6 App. Ca., 99 (1881).

as if he had originally authorized it. Sir Henry Strong, Chief Justice, considers the case of "Brook v. Hook,"[13] in so far as it at variance with this doctrine, to have been overruled by this case and that the judgment of Martin, B., who dissented in "Brook v. Hook," must now be taken to be an accurate statement of the law.[14] It would be within the equity of the statute to say that in so far as the forged signature is ratified the bill becomes operative and effectual in the same manner as if no offence had been committed and the signature had been duly authorized. But equitable interpretations are not in favor. The statute will probably be interpreted according to its express terms and the proviso will only be extended to the ratification of an unauthorized signature which does not amount to a forgery. If the signature was placed on the bill under circumstances amount-to forgery the proviso is silent in regard to such signature and the section is left to its operation.

No ratification unless forgery was under pretended authority.—In "Dominion Bank v. Ewing,"[15] the facts of which are stated in the next following note, the Ontario Court of Appeal distinguished the case from those in which the forgery had been held to have been ratified, saying: "The case is precisely within the holding in 'Merchant's Bank v. Lucas,, 15 A. R., 573, affirmed in Supreme Court, 18 S. C. R., 704, that 'the act of forgery in the transaction not being an act professing to have been done for or under the authority of defendants, was incapable of ratification.' 'Scott v. The Bank of New Brunswick,' 23 S. C. R., 277, is not opposed to this. In the language of the Chief Justice, (Sir H. Strong), that was a case of 'a pretended agent obtaining payment of money belonging to his assumed principal by false representations as to his authority. There was a professed agency and, therefore, something capable of ratification by the alleged principal.' And see the proviso of section 24 of the Bills of Exchange Act, 53 Vic., ch. 33 D." This is the proviso now under consideration. In the case in which this language is used by the Court of Appeal,

[13] L. R., 6 Ex., 89 (1871).
[14] *Scott v. Bank of New Brunswick*, 23, S. C. R 283 (1894).
[15] (1904). O. L. R., 90

Meredith, C. J., seemed inclined to hold that there might be a ratification. "Can it not be said that the maker of a negotiable instrument always gives authority to the holder to pledge the maker's credit for the payment of it, and that the holder in negotiating it acts expressly or tacitly upon that auhority, and is not that enough? Must the holder always go further and profess to have performed the mechanical part of actually signing for the maker? Is it not enough to pledge the maker's credit, and to be acting on that authority, and does he not really always so profess by his acts if not in words?'" The case was one in which the name of the defendants had been forged, but there was no pretence of authority to use the name so forged beyond the bare fact of the forgery, which the Court of Appeal held not to have been ratified by the defendant's conduct because the forger had not professed to act under the defendant's authority.

Liability on forged instrument resulting from estoppel by silence.—In the case noted in the preceding paragraph the defendant's name was forged as maker of a note for $2,000. The bank that discounted the note advised defendant of the fact and he at once communicated with the forger, and several letters were exchanged between them, but defendant did not, until after several months had elapsed, inform the bank of the fact that his name had been forged. A large part of the proceeds had not been paid out by the bank until after the time when the banker could have had notice from the defendant that the note was a forgery. The Court of Appeal held that the defendant was estopped by his conduct from denying that he was the maker of the note. "No doubt, a man is not bound to answer every letter he receives, or to combat every charge or allegation which the writer may make against him. 'Wideman v. Walpole,' 1891, 2 Q. B., 534. But a business communication like that in question stands on quite a different footing and, according to the dictates of common sense and fair dealing, does require an answer, since it must be apparent to the receiver that the future conduct of the sender, in regard to the receiver's supposed obligation, may or will be different if it is a forgery from what it would be if it were the genuine instrument it was thus taken for. * * * That silence

under such circumstances, when coupled with resulting damage, will create an estoppel against a person in the defendant's situation is shewn by 'McKenzie v. The British Linen Co.', 6 App. Cas., 82, where the general law is stated very fully. A passage from Lord Watson's judgment may be quoted: * * * 'It would be equally contrary to justice to hold him responsible for the bill because he did not tell the bank of the forgery at once if he did actually give the information, and if, when he did so, the bank was in no worse position than it was at the time when it was first within his power to give the information.'"

Liability in such case is for whole amount of note, not merely for amount lost in consequence of silence.—If the bank, in such a case as "Dominion Bank v. Ewing," referred to in the two preceding paragraphs, were claiming damages for some false representation of the defendant, it would recover merely to the extent of the loss attributable to the false representation. In the case of liability resulting from estoppel it recovers the amount to which it would be entitled on the assumption that the statement which the defendant is estopped from denying, is true. That is to say, it charges the defendant as maker of the note in question. Defendant is estopped from denying that he is the maker. He is consequently liable for the whole amount of the note as if he were the maker. As Osler, J. A., quotes from the judgment in "Fall River National Bank v. Buffington," (1867), 97 Mass., 489: "If the action were for deceit in making a false representation the rule of damages would be found by ascertaining, as the defendant asks should be done, in how much worse condition the plaintiffs had been put by reason of the deceit. The injury which would result to the plaintiff from allowing the defendant's admission that he was indorser to be denied would be the loss of his security as indorsee, and the estoppel is to be co-extensive with the injury."

When does an unauthorized signature amount to forgery?—This is a question of criminal law, the full discussion of which would lead as far afield. See chapter 146 of the Revised Statutes of Canada, 1906, "the Criminal Code," sec. 466, and following sections.

Payment by bank of forged cheque.—The editing committee of the Journal of the Canadian Bankers' Association, being asked whether a bank would have any recourse against an indorsee to whom it had paid a cheque, the signature of the drawer having been forged, reply that the law is quite clear. The bank is bound to know the signature of its own customer and it pays a forged cheque at its own peril.* In the case supposed, the bank would have no recourse whatever against the innocent party to whom it paid the money. The position of the bank is analogous to that of the acceptor of a bill who, by section 129 of the Bills of Exchange Act, is precluded from denying the genuineness of the drawer's signature.[16]

A case arose in Western Australia[17] which came before the Judicial Committee of the Privy Council in 1896. The cheques in question had been forged by one, Armstrong, and paid by the bank. The knowledge of the forgery came to the agent of the bank before it was acquired by the customer, and, on its being communicated to the customer by the agent, the former requested the agent not to make the matter public, assuring him that if he did so "the corporation would lose all chance of getting the money back, that the man would be arrested and they would lose the money." Upon those representations and the further plea that it would nearly kill the forger's old father if the directors were informed, the agent said nothing about the matter. It was held that under these circumstances the plaintiff was not estopped from claiming that the amount should be made good by the defendant corporation. Had the agent's statement "been confined to the fact that the cheques had been forged by Armstrong, it is hardly conceivable that the appellant would have been under any duty to re-convey to the bank the information which he had received from its own agent. In that case the customer could not have been reasonably held responsible for a failure on the part of the bank's officer to impart his information to the bank unless he had good cause to suspect such a breach of duty was contemplated by the officer and assisted in its concealment."

[16] 4 J. C. B., 203.
[17] *Ogilvie* v. *West Australian Mortgage Co.*, 1896, A. C., 257.
* See *contra*, decision of Anglin J., in *Rex* v. *Bank of Montreal*, 10 O. L. R. at p. 141.

Notice of forgery to be given within one year from acquiring the knowledge.—It strikes one on reading these sections relating to forgery as a whole that there is a marked incongruity between the original section 49 and the amending section now numbered 50. Under the latter section the party seeking to recover back the money paid under a forged or unauthorized indorsement is required to give notice within a reasonable time after he acquires notice that the indorsement is forged or unauthorized. Under section 49 b, if a cheque, which is a species of bill of exchange, is paid upon a forged indorsement the drawee seems to have a year from the acquiring of notice of the forgery within which to give notice to the drawer. The editing committee of the Journal of the Canadian Bankers' Association have had their attention drawn to this latter provision, and they say, "We do not think it follows that the act, in declaring that no claim shall exist[18] after a year, is intended to give a party the right to sleep on his claim for that year, and thereby injure the bank's position, perhaps destroy its chance of getting back the money. All that the proviso means probably is that notice given a year after the discovery shall not avail. It leaves the question of whether the notice given within a year is good or not to be dealt with under the ordinary principles of law."[18] There may be some misconception about this. In the same note the editors say that the notice referred to is clearly "the discovery that the cheque has been paid on a forged indorsement," but these are not the words of the statute. It does not speak of notice of the discovery that the cheque has been paid, but of notice of the discovery that the cheque has been forged.

Necessity for further legislation.—The sections commented upon present evidence of the want of care in their drafting. If the new section now numbered 50 is intended to include the case of a cheque, as the comment of Mr. Lash, above referred to plainly assumes, it is difficult to see any good reason for retaining clause b of section 49. The later section includes the case covered by the earlier. A cheque being only a species of bill of

[18] 5 J. C. B., 116-117.

exchange, the law providing for the payment of a bill on a forged indorsement includes the case of payment of a cheque; and a payment under circumstances such as are dealt with in section 50 and not in any way restricted by the terms of the section must include the case more narrowly restricted in the earlier section of a payment out of the funds of the drawee. The later section applies only to a payment in the ordinary course of business. If this is a proper and necessary limitation in the case of a bill of exchange generally, there is no good reason why it should not apply to the case of a cheque. The consequence is that there appear to be two clauses of the act dealing with substantially the same kind of transaction and dealing with it in substantially different modes, the only clear difference being that the earlier clause deals with the relations between the drawee and drawer, while the latter deals with those between the drawee or acceptor, and the holder or indorsers, and those between the respective indorsers.

Signature by procuration is notice of limited authority.

51. A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is bound by such signature only if the agent in so signing was acting within the actual limits of his authority. 53 V., c. 33, s. 25. [E. s. 25.]

Signature as agent puts the holder on inquiry as to agent's authority.—This section is part of a larger rule, of which several other illustrations are afforded in the act. The rule is stated by Mr. Ames to be that one to whom a bill is offered is affected with constructive notice of everything apparent on the face of the instrument; in other words, he is conclusively taken to have read it. A purchaser must therefore take notice at his peril of a signature "per procuration," and, as a legal consequence, of the limited authority of the agent so signing. He is bound "at his peril," says Byles, J., in "Stagg v. Elliott,"[19] (1862), to inquire into the nature and extent of the agent's authority. It is not enough to show that other bills similarly accepted or indorsed have been paid, although such evidence, if the acceptance were general,

[19] 12 C. B. N. S., 373.

by an agent in the name of a principal, would be evidence of a general authority to accept in the name of the principal. When the authority of the agent purports to be derived from a written instrument, or per procuration, Mr. Daniel says the party dealing with him is bound to take notice that there is a written instrument of procuration, and he ought to call for it and examine it, being chargeable with enquiry as to the agent's authority. If, without examining it, when he knows of its existence, he ventures to deal with the agent, he acts at his peril and must bear the loss if the agent transcends his authority.[20]

Principal bound by the authority apparently conferred, though limited by secret instructions.—If the agent is acting within the scope of his apparent authority the fact that he has exceeded his actual authority does not prejudice the party who deals with him. This is contrary to the literal terms of the section, because it says that the principal is bound only if the agent is acting within the the actual limits of his authority, but we must understand that this phrase means the actual limits of the authority apparently conferred. The principal cannot hold out the agent as having authority to do an act and bind those who deal with the agent by secret instructions contrary to the apparent authority. In one sense, the secret instructions constitute the actual authority of the agent, but that is not the sense in which the words must be read. The recent judgment of the Privy Council in the cases of "Bryant et al. v La Banque du Peuple," and "Bryant et al v. Quebec Bank,"[21] illustrates both the rule embodied in the section and the qualification just stated. One, Davies, had a power of attorney from the plaintiff, which, as put shortly by the Board, authorized him to enter into contracts for three specified purposes: (1) the purchase and sale of goods; (2) the chartering of vessels; and (3) the employment of agents and servants, and, as incidental thereto and consequent thereon, to do certain specified acts and other acts of the same kind as those specified. The attorney, for the purpose of obtaining money for his own private use, went to the bank and

[20] *Daniel on Neg. Inst.* Sec. 280, p. 293, 5th. Ed.
[21] 1983, A. C., 170.

asked for a loan of $25,000, saying that it was required for the purpose of a remittance. The bank first named advanced the money on a cheque signed in the name of the plaintiffs and indorsed in their name, "per pro C. G. Davies." The court read the power of attorney as not containing any authority to borrow money for the principals and decided that the bank could not charge them with the amount of the loan.

In the case against the other bank the bills were indorsed in the name of the plaintiffs in the same way as in the other case, "per pro," but they were discounted by the bank in the ordinary course of business, and therefore within the scope of the agent's apparent authority, and the court agreed with the judge of the court below that the fact that Davies had abused his authority and betrayed his trust could not affect the bona fide holders for value of negotiable instruments indorsed by him apparently in accordance with his authority. The language of the Court of Appeal in New York was cited with apparent approval to the effect that, "whenever the act of the agent is authorized by the terms of the power, that is, whenever by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent as to all persons dealing in good faith with the agent; such persons are not bound to inquire into the facts aliunde. The apparent authority is the real authority."[22]

Person signing for a principal or in representative capacity not personally liable. But mere description as agent &c., not sufficient for this purpose.

52. **Where a person signs a bill as drawer, indorser or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.**

Construction most favorable to validity adopted.

(2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favorable to the validity of the instrument shall be adopted. 53 V., c. 33, s. 26. **[E. s. 26.]**

[22] *Westfield Bank v Cowen*, 37 N. Y. R., 10 Tiff., 322.

Words indicating representative capacity distinguished from mere description of signer.—The draftsman has, in this section, experienced the difficulty of distinguishing the cases on which the section is founded. When will the words added to the signature indicate that the person signing signs on behalf of a principal or in a representative capacity, and when will they be read merely as words describing him as an agent or as filling such representative character? It is doubtful if the cases can be reduced to any very clear principle.

A bill drawn on P. C. DeLatre, President of the N. H. & D. Co. & H. Co., and accepted by him in the same terms, presents no difficulty. It is simply the case of a bill addressed to the individual and describing him as the president of the company, and his acceptance in the same form makes him personally liable.[23] Had he affixed the seal of the company to the document after his signature, it seems that it would have made no difference.[24] But there is authority that if it had been accepted in the name of the company, per P. C. DeLatre, President, the case might have been different. Thus, where a bill was addressed to James Glass, Secretary Richardson Gold Mining Co., and was accepted, The Richardson Gold Mining Company, per James Glass, Secretary, Gwynne, J., speaking for the Court of Common Pleas, held that Glass was not personally liable.[25] The mode of the acceptance clearly excluded the idea of a personal liability, and the case was distinguished from that of "Mare v. Charles,"[26] where there was no mention of any official capacity in the address to the drawee and he was held personally liable on his acceptance, although he had signed, "accepted for the company, William Charles." It is not easy to reconcile this case of "Robertson v. Glass" with that of "Madden v. Cox,"[27] which would seem at first blush to have been a stronger case for excluding the idea of personal responsibility than that of "Robertson v. Glass. The bill was addressed to the President of the Midland Railway Company, not naming him as in the earlier case, and was accepted, "For the

[23] *Bank Montreal* v. *DeLatre*, 5 U. C. Q. B., 362 (1849).
[24] *Foster* v. *Geddes*, 14 U. C. Q. B., 239 (1856).
[25] *Robertson* v. *Glass*, 20 U. C. C. P., 250 (1870).
[26] *El. & Bl.*, 981.
[27] 44 Q. B., 542 (1879).

Midland Railway Company of Canada, H. Read, Secretary; Geo. A. Cox, President." It was held againt the dissenting opinions of Patterson and Morrison, JJ., that the president was personally liable on his acceptance. Burton, J. A., who was in the majority, considered that this bill had not been addressed to the company and as it could not be accepted by anyone but the drawee, the defendant must be held to have intended to make a valid acceptance, which could only be his own personal acceptance of the bill, and the words indicating that he did it "for the Midland Railway," together with the countersignature of the company, were merely intended to earmark the transaction and not to indicate that the acceptance was signed on behalf of the company.

In the foregoing cases the bill was not addressed to the company "eo nomine." Even where it is addressed to the company the persons who accept may incur a personal liability to a holder in due course if the company has no power to accept bills. But the case in which this was decided[28] was not put on the ground of the liability as acceptors, but on the ground that the persons who made the acceptance in the name of the company knew that they had not, in fact, any authority to accept, and made a false representation that they had such auhority, which representation was meant to be acted upon by the discounters, and was acted upon to their prejudice. The representation was held to be of a matter of fact, depending as it did on the contents of the private acts of parliament constituting the company. When a case arises on a misrepresentation of this kind made innocently and amounting only to a warranty, a fine question will present itself whether the warranty is negotiable and passes with the bill.

The case of an agent drawing on his principal presents no difficulty. Where the defendants gave in payment for a load of coal their drafts on their principals signed by themselves, adding the words "agents." This was considered merely descriptive, and they were held liable as drawers.[29] In the same way where the defendant, an Inspector of an Insurance Company, gave in settlement

[28] *West London Com. Bank* v. *Kitson*, 13 Q. B. D., 360 (1884).
[29] *Read* v. *McChesney*, 8 U. C. C., 50 (1858).

of a loss his draft on the company, signed, "A. Squier, Inspector," he was held personally liable.[30]

In the same way, where the promissory note of the Secretary of an Insurance Company was given in settlement of a claim, he was held personally responsible, although he signed, E. H. Gates, Secretary O. M. & F. Co., and in the body of the note inserted the words, "value received by the O. M. & F. Insurance Co."[31] Where the note was in the form,—We, the undersigned, being members of the Executive Committee, on behalf of the London and Southwestern Railway co-operative company, do jointly and severally promise to pay, &c.—the makers were properly held personally liable.[32] The Society was unregistered and not a corporation. On the other hand, where the note was signed by G. H., President of Grand Trunk, &c., Railway Company, and F. A. W., Secretary of Grand Trunk, &c., Railway Company, and the seal of the company was affixed, the signers were not held personally liable.[33] The decision turned more or less on the special statutes affecting the company and the provisions of the general act of Canada, then in force Moreover, it was possible to read the personal pronoun, as referring to the corporation in its corporate capacity. With this may be compared the case in which the note ran, "We, the Directors of the Isle of Man Slate Company, Limited, do promise to pay, &c.", and the note was signed, R. J. M., Chairman, the others signing without any descriptive words. The signers were held to be personally responsible, although the seal of the company was affixed.[34] The rule laid down there was that where the signers merely describe themselves as directors, but do not state that they are acting on behalf of the company, they are individually liable; but on the other hand, if they state that they are signing on account of or on behalf of some company or body of whom they are the directors and the representatives, as the the case of "Lindus v. Melrose"[35] fully establishes, they do not make themselves liable when they sign their names, but

[30] *Hagarty* v. *Squier*, 42 U C. Q. B., 165 (1877).
[31] *Armour* v. *Gates*, 8 U. C C. P., 548 (1859).
[32] *Gray* v. *Raper*, L. R., 1 C. P., 694 (1866).
[33] *City Bank* v. *Cheney*, 15 U. C. Q. B. 400, (1858)
[34] L R, 6 Q. B., 361 (1871).
[35] 3 H. & N., 177 (1858)

are taken to have been acting for the company as the statement on the face of the document represented. Here the directors did not use any words to exclude the idea of personal responsibility, apart from the descriptive words in question, and the affixing of the seal was not regarded as having that effect. It had been affixed possibly for the mere purpose of ea marking the transaction.

In the case of "Lindus v. Melrose," here cited for the distinction on which the decision rests, the note was signed by the three directors, as directors, and in the body of the note the statement that there was "value received in stock of the London and Birmingham Iron and Hardware Company, Limited," was held sufficient to exclude the idea of personal liability. The promise, moreover, was made jointly and not "jointly and severally," and it was conceded that if the promise had been made jointly and severally it would have been difficult to resist the conclusion that a personal liability was meant to have been created. "The words, 'jointly and severally,' are quite decisive," i. e., in favor of a personal liability, per Shaw, C. J., in "Bradlee v. Boston Glass Co.", 16 Pick., 351, (1835.)

The latest case on the subject in the Supreme Court of Canada was determined partly on the analogy of the case of "Alexander et al. v. Sizer,"[36] where the promise was signed "for Mistley, Thorpe and Walton Railway Company, John Sizer, Secretary," and it was held that Sizer was not individually liable notwithstanding his use of the first personal pronoun. In the Canadian case,[37] apart from evidence of the intention of the parties, the only circumstance to rebut the inference that the signer intended to assume an individual responsibility was the signature, "W. D. Rorison, Manager Otter Tail L. Co.", and the use of the personal pronoun "we." The company was not mentioned in the body of the note, but it was held that they were liable. The court did not decide, and it was not necessary to decide, whether Rorison was not also individually liable, but Patterson, J., in delivering the judgment of the majority, said: "Here we couple the words, 'we promise,' which are not appropriate to a promise by one man, with the designation, 'Manager of

[36] L. R., 4 Ex., 102 (1869).
[37] *Fairchild v. Ferguson*, 21 S. C. C. 484 (1892).

Otter Tail L. Co.', and we go no further than the authorities warrant when we read the promise, according to what it was in fact intended to be, as the promise of the company, and the signature as being written as Manager." There was no dissenting opinion, but Gwynne, J., delivered an independent opinion concurring in the result arrived at by the majority, in which, referring to the contention of the defendants, that the use of the plural pronoun would not affect the question if there was really only one signature, and that the note should be read: "We, the Manager of Otter Tail Lumber Company, promise to pay, &c., (sgd.) W. D. Rorison, Manager," he suggested that the more natural and reasonable way of reading the document would be: "We, the Otter Tail Lumber Co., promise, &c.. (sgd.) W. D. Rorison, Manager," in which case there could be no doubt that the Lumber Company would be the persons represented on the note as makers. And this was the way in which, in his opinion, the note should be read.

In a case in which executors were held personally liable on a promissory note although they professed to contract as executors in the body of the note and signed as executors, the decision was put upon the ground that the goods which were the consideration for the note could not be sold, nor services rendered to a person in a representative character, and the law implied a personal contract to pay. Even had the consideration, however, been received by the testator the note would have been read as admitting assets and obtaining time to pay.[38] In another case the note was payable on demand, which was regarded as an admission of assets, and the promise was joint and several.[39] It was suggested that if the intention had been to incur no personal liability, the words, "payable only out of the estate," should have been added to the words, "as executors." An engagement to pay interest, for which the estate could not be made liable, was relied on as an additional reason for holding the liability to be a personal one.

Mr. Justice Maclaren adds a useful note on the subsection to the effect that it is in accordance with the maxim, "ut res magis valeat quam pereat," saying that in

[38] *Ker et al* v. *Parsons*, 11 U. C. C. P., 513 (1862).
[39] *Childs* v. *Morrins et al*, 2 Bro. & B., 460 (1821).

many cases where an agent or officer has been held personally liable it is quite evident that he did not intend to bind himself personally and there has been a great deal to be said in favor of his not being liable, but, inasmuch as he did not legally bind his principal or the company, as the case may be, he has been considered personally responsible on the principle laid down in the sub-section.

CONSIDERATION.

53. Valuable consideration for a bill may constituted by,—

Valuable consideration is any that would support a contract.

(a) any consideration sufficient to support a simple contract;

e. g. antecedent debt.

(b) an antecedent debt or liability.

Such debt so deemed even of bill payable on demand.

(2) Such a debt or liability is deemed valuable consideration, whether the bill is payable on demand or at a future time. 53 V., c. 33, s. 27. [E. 27.]

Mr. Ames' doctrine as to consideration for a bill.— Mr. Ames in his summary, states in capital letters, that "a bill or note is valid without consideration," and adds: "It is frequently stated in the books that as between the immediate parties to a bill or note a consideration is necessary to the validity of the obligation. This notion, it is submitted, is erroneous upon principle, and also upon the authorities, for, although it must be conceded that the courts have sanctioned the defence of absence of consideration in certain cases, these decisions should be regarded as anomalous exceptions to the rule that a bill, being in the nature of a specialty, is obligatory without a consideration, rather than as illustrations of the opposite doctrine, that a bill, being a simple contract, requires a consideration to support it."[40]

Mr Ames is obliged to concede that no action can be maintained by the drawer against a party who executes or indorses a bill either as a gift "inter vivos," or as a "donatio mortis causa,"[41] and of course the reason given

[40] 2 *Ames Cases on B. & N.* 876.
[41] Ib., p. 877.

by any English judge or lawyer would be that there was no consideration for it. The New Brunswick case among Mr. Justice Maclaren's illustrations, of the note given by W. McLeod to his son-in-law by way of advancement to his daughter, rests upon this principle. It was a mere gift, or rather as Ritchie, C. J., said, "It is essential to a gift that it goes into effect at once. A gift 'inter vivos' by a note or promise not under seal is not a present gift but merely a promise without consideration."[42]

But notwithstanding the concession referred to, Mr. Ames proceeds to set forth an array of reasoning by which to establish his doctrine and, after citing a number of cases on which he relies, he says that "in none of the preceding classes of cases is it possible to find a common law consideration to support the defendant's obligation as a simple contract, but they are all consistent with the theory that a bill is mercantile specialty. Furthermore, the practice of declaring on a bill without any averment of consideration can only be explained by the fact that no consideration is necessary to create the obligation."[43]

We may say with confidence that this is not the view of the matter taken by English courts and lawyers. It is perfectly true that the courts treat a bill or note as having some of the qualities of a specialty. It is itself the cause of action on which the plaintiff sues, and not, as a mere written agreement would be, simply the evidence of a contract. For this reason the consideration does not require to be stated in the plaintiff's pleading or proved by the plaintiff in order to enable him to recover, as it would be if he were suing on an ordinary simple contract. The burden of alleging and proving the absence or failure of consideration rests upon the defendant. Furthermore, Mr. Ames is right, following Mr. Langdell,[44] in the statement that there may be forms of consideration sufficient to support a claim on a bill or note which would not be sufficient in the case of an ordinary simple contract. In "Hopkins v. Logan,"[45] the plaintiff's declaration set out an account stated upon which the

[42] *Thomas* v. *McLeod*, 12 N. B., 598 (1869).
[43] 2 *Ames Cases on B. & N.*, 877.
[44] 2 *Langdells Cases on Contracts*, 1014 (summary).
[45] M. & W., 241 (1839).

defendant acknowledged an indebtedness to the plaintiff and alleged an express promise to pay the amount on a future day named. The declaration was demurred to and the court held it bad on the technical ground that the law implied from the fact of the account stated a promise to pay the amount on request, and any other promise founded upon the same consideration was "nudum pactum." There must be some new consideration for the express promise to pay on the 10th of October or, otherwise, as Maule, J., said, there would be two co-existing promises on one consideration. Mr. Langdell's point is that, as a promissory note given on such a consideration as this would certainly be held good, it follows that the note is good without any consideration. But it does not follow that because there would be no consideration for the mere agreement to pay the amount of the account stated at a future day, there would, therefore, be none for a promissory note to pay at a future day. It has been long recognized that a note so given is founded upon a perfect consideration. "It has been supposed to rest," as Lush, J., said in "Currie v. Misa,"[46] "on the ground that the taking of a negotiable security payable at a future day, implied an agreement by the creditor to suspend his remedies during that period, and that this constituted the true consideration which, it is alleged, the law requires in order to entitle the creditor to the absolute benefit of the security."

Antecedent debt is good consideration for a negotiable bill even if bill be payable on demand.—The principle stated in the words just quoted has been embodied in the Act, and, on the authority of the case from which they are taken, has been extended to the case of a security not payable on a future day, but on demand. It might be contended, as it was in that case, that while there might be consideration for the note payable at a future date there could be none for a note payable on demand, as there was no suspension of the remedy. But, as Lush, J., further said, "assuming that it is the implied agreement to suspend which is the true ground on which the delivery or indorsement of a bill or note payable at a

[46] L. R., 10 Ex., at 163 (1875).

future date is held to give a valid title to a creditor in respect of a pre-existing debt, it does not follow that the legal element of consideration is entirely absent where the security is payable immediately. The giving of time is only one of many kinds of what the law calls consideration. A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, or loss or responsibility given, suffered or undertaken by the other."

Having presented this definition of consideration and shown how it could apply to the case with which the court was then dealing, of a cheque given by the payee to the plaintiff in payment of a pre-existing debt, his Lordship proceeded to say: "It is useless to dilate on the point, for in truth the title of a creditor to a bill given on account of a pre-existing debt, and payable at a future day, does not rest upon the implied agreement to suspend his remedies. The true reason is that given by the Court of Common Pleas in 'Belshaw v. Bush,'[47] as the foundation of the judgment in that case, namely, that a negotiable security given for such a purpose is conditional payment of the debt, the condition being that the debt revives if the security is not realized." This reason was held to be applicable as well to a negotiable instrument payable on demand as to one payable at a future day.

Quaere as to a non-negotiable bill.—But the point was still left open as to the effect of a non-negotiable bill. Such a bill may be payable on demand or at a future date. Mr. Ames seems to consider that a non-negotiable bill, although payable twelve months after date, would not be founded on good consideration if given for a pre-existing debt, and that this was the ground on which "Nelson v. Searle"[48] was decided;[49] and Lush, J., in the case referred to, discussed the case of "Crofts v. Beal,"[50] where a note given on demand without any new consideration was held to be "nudum pactum," with the remark, "it is sufficient to say of that case that the note

[47] 11 C. B., 191, 22 L. J. (C. P.) 24 (1851).
[48] 4 M. & W., 795 (1839).
[49] 2 *Ames Cases on B. & N.*, 876.
[50] 11 C. B., 172; 20 L. J. (C. P.) 186 (1851).

was payable to plaintiff and not to order or bearer, and was not, therefore, a negotiable security."[51] Since the passing of the act such a note would be negotiable, but even if it were restricted so as to be a non-negotiable bill, must we hold that it would be without consideration? Not if we read the statute as Lord Herschell read it in Vaglianos' case.[52] "Valuable consideration for a bill," not merely if the bill be negotiable, but for any document that answers to the definition contained in the act, "may be constituted by an antecedent debt or liability; such debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time."[53] We must, in other words, read this section as applicable to non-negotiable as well as to negotiable bills, unless we start with a presumption in favor of a distinction in this respect between a negotiable and non-negotiable bill of which the statute gives no hint, and of which we can only know by reference to cases decided before the enactment of the statute which it was the main purpose of the statute to relieve us from the necessity of considering.

Note given for a debt barred by the statute of limitations.—A note given for a debt barred by the statute of limitations is also held to be good, and this Mr. Ames considers to afford support to his doctrine. But this case does not militate in any way against the received notion that there must be a consideration to support a note or bill. Although the action is barred the obligation still exists and furnishes all the consideration that the act, or the cases on which it is founded, require to support the contract. A different reason from this one was given by Mr. Dalton in "Wright v. Wright,"[54] where he said, in deciding that a plea was bad which set up in answer to a promissory note that it was given for a debt barred by the statute of limitations, "I must follow the case of 'Austin v. Gordon,'[55] in which it was held that a debt for which a discharge had been given in insol-

[51] L. R., 10 Ex., at p. 164.
[52] Ante p. 3.
[53] Section 53.
[54] 6 U. C. P. R., 295 (1876).
[55] 32 U. C. Q. B., 621 (1872)

vency was a continuing debt in conscience and was therefore a sufficient consideration for a promise to pay."

Note for a debt discharged in bankruptcy proceedings.—A continuing debt in conscience may have been a good consideration for a promise in Lord Mansfield's day, when "Trueman v. Fenton"[56] was decided, in part, at least, on this ground. It could hardly be admitted as consideration since the doctrine of Lord Mansfield was overthrown by the judgment of Lord Denman in "Eastwood v. Kenyon,"[57] The conclusion in favor of the validity of such a note is based, in part, at all events, upon the construction of the Bankrupt act and on inferences drawn from its provisions with reference to the avoidance of securities given upon consideration of signing the bankrupt's certificate. When there comes to be an Insolvency law in Canada the effect of a note given for a debt that has been discharged will probably depend more upon the construction of the statute than upon the theory of an obligation resting upon the conscience of the debtor.

Note for a claim unenforceable under statue of frauds.—A bill given for a claim not enforceable under the statute of frauds rests on a solid foundation. It is well established that a contract coming within the fourth or seventeenth section of the statute of frauds is good for all purposes except that of bringing an action upon it, and there is no possible reason why it should not be a good consideration for a promissory note, though the opposite seems to have been decided in an early case in the Nova Scotia Reports.[58]

Note for liability enforceable only in equity.—Mr. Ames mentions the case of a note given for a liability enforceable only in a Court of Equity and which was held to be given on good consideration.[59] The case was that of a married woman who had given her promissory

[56] *Cowper*, 548.
[57] 11 *Ad. & El*, 438 (1840)
[58] *Black* v. *Gesner*, 3 N. S. (2 Thomson) 157 See contra *Jones* v. *Jones*, 6 M & W., 84 (1840).
[59] *Latouche* v. *Latouche*, 34 L J. Ex., 85.

note for advances made to her husband and which, in equity, bound her separate estate. The note so given was held to be good consideration for another note given by her after her husband's death.

Note for a claim void under laws against gambling, &c.—Mr. Ames also mentions the case of a note given for a void claim saying, that a creditor may sue upon a bill or note given by a person for a claim void for illegality, e. g., gaming, usury, and the like. The consideration of this topic will be taken up under section 56 (2).

Note given upon a consideration moving from a stranger.—The case of a bill or note given for a consideration moving from a stranger presents a difficulty. It is a principle of the law of contract that the consideration must move from the promisee, and for that reason where the plaintiff's father and the defendant had made an agreement in view of the marriage of the plaintiff to the daughter of the defendant, that each should pay an agreed amount to the plaintiff, and that the plaintiff should have the right to sue the parties so agreeing in any court of law or equity for the sums so promised, it was held that the plaintiff could not maintain the action on the ground that there was no consideration moving from him as promisee.[60] He was "a stranger to the consideration," and the modern cases have established the doctrine "that no stranger to the consideration can take advantage of a contract, although made for his benefit." This doctrine was applied by the Supreme Court of Nova Scotia to a case where a deed of land was made by a father to one of his sons, who gave his notes of hand therefor, payable to the other sons respectively for their share of the value, the arrangement having been made for the purpose of distributing the estate of the father without a will, and it was held that the payees could not recover on the notes as the consideration did not move from them.[61] But Mr. Ames says, and this is one of his reasons for considering a promissory note as not governed by the common law doctrine of consideration, that

[60] *Tweddle v. Atkinson*, 1 B. & S., 393 (1861).
[61] *Forsyth v. Forsyth*, 1 R. & G., 380. Compare *Cossitt et al v. Cook*, 5 R. & G. 84.

a payee may sue a drawer or maker although the consideration received by the drawer or maker moved from a third person. One of the cases cited by Mr. Ames as authority for his proposition is the New Hampshire case of "Horn v. Fuller,"[62] which greatly resembles the Nova Scotia case of "Forsyth v. Forsyth," (ante p. 183.) The document was dated in the usual way and read, "Agreeably to my father's last will, I promise to pay James Horn fifty dollars, when he shall arrive at the age of twenty-one years." No objection was taken that the promise was not absolute and the document was treated as a promissory note. It was signed by John Fuller and also by Asa Fuller, his father, and the objection was taken that there was no consideration, and that it was merely a gift from Asa Fuller. The court held that it must be considered as an order by the father upon the defendant, his son, and accepted by the latter. "And this is prima facie evidence that the father had placed the money in the defendant's hands for the use of the plaintiff. It is immaterial whether, as between Asa Fuller and the plaintiff there was any consideration. The presumption is that the defendant has the money, and he is not at liberty to dispute the consideration between the other two." The other case cited by Ames is "Munroe v. Bordier."[63]

Bill given for the debt of a third party.—The case of a note given for the debt of a third party does not stand on the same footing as that of a note given to the promisee for a consideration moving from a third party. Mr. Langdell in his summary,[64] discusses this topic, not as affecting the validity of a negotiable instrument, but in connection with the subject of consideration generally. He refers to a case in which it was erroneously held in 1583[65] that the consideration was insufficient because it was not a benefit to the promisor, though it was a clear detriment to the promisee, and draws the distinction in this respect between the action of assumpsit and the action of debt. In debt, the consideration must be re-

[62] 2 *Ames Cases on B. & N.*, 680, 6 N. H., 511 (1834).
[63] 8 C. B 862 (1849).
[64] 2 *Langdell's Select Cases on Contracts*, p. 1021.
[65] *Smith and Smiths' Case*, 3 Leonard, 88.

ceived by the debtor, because that is what creates the debt, and that was a principal reason why debt was so limited in its scope, and why a new remedy not subject to such a limitation was so loudly called for. Such a remedy was found in the action of assumpsit. The action on a promissory note or bill of exchange was an action of assumpsit and not an action of debt. It was and is governed by the principles as to consideration governing actions of assumpsit and not those, in so far as they differ, which are applicable to the action of debt. The consideration must move from the promisee,—unless the position taken by Mr. Ames and discussed in the last note is tenable, though opposed to the Nova Scotian authority of "Forsyth v. Forsyth,"—but it need not enure to the benefit of the promisor, and therefore, a note given for the debt of a third person may be founded on good consideration. Mr. Ames refers to a number of cases in which this has been decided.[66]

The case of "Popplewell v. Wilson,"[67] which is one of his authorities is very meagrely reported. It was "error of a judgment in C. B. in a case upon a promissory note entered into by A. to pay so much to B. for a debt due from C. to the said B. And it was objected this, not being for value received, was not within the statute, and "prima facie" the debt of another is no consideration to raise a promise. But the court held it to be within the statute, being an absolute promise, and every way as negotiable as if it had been for value received." In "Sowerby v. Butcher,"[68] the case was stated to be that the plaintiff had sold coal which was consigned to Devey & Co., on the application of Robert Butcher, the plaintiff's brother, for which Robert Butcher was liable, and for which he drew a bill on Devey & Co., which was returned unaccepted. Meantime, Robert Butcher had left Newcastle and the plaintiffs applied at his counting-house, where they saw his brother, the defendant, who accepted a bill for the amount without professing to be an agent or taking any precautions not to become personally liable. It was held that there was consideration for this bill. "The debt of a third person

[66] 2 *Ames Cases on B. & N.*, 876.
[67] 1 *Strange*. 264 (1719).
[68] 2 Cr. & M., 368 (1834.)

is a good and valid consideration, for which a party may bind himself by a bill; and the consideration need not of necessity be such as would enable the plaintiffs to sue on a special contract. If there is detriment to the plaintiffs and they have a right to insist upon a bill from any person, that is enough; and it it is not sufficient for the defendant to show that there was not such consideration as would support an action independently of the bill." The remark here made, "that there need not of necessity" be such a consideration as would enable the plaintiffs to sue on a special contract certainly points to a distinction between the kind of consideration necessary to support an ordinary simple contract and the kind sufficient to support a bill. But it strikes one that there could be no difficulty about the consideration here. "The second bill," as Vaughan, B., said, "was to be a substitute for the first bill, which was destroyed." In "Baker v. Walker,"[69] which was the case of a note given for a judgment debt, Parke, B., said an agreement would be inferred from the making of the note to suspend the remedy on the judgment for the period of the note, and that it was like the case of a note given for the debt of a third party, which has been held to be a sufficient consideration. "It was so held in 'Popplewell v. Wilson' and the principle has been acted upon in many cases. A promissory note, although not a specialty, resembles a specialty, and at all events is a security." In Mr. Arnes' note to this case, he quotes a remark of Parke, B., in "Ford v. Beech,"[70] where he re-affirmed his opinion that a note resembled a specialty, saying: "It wants no con-consideration. If I give a promissory note to A. for the debt of B., no consideration is necessary: it is payment. You do not want consideration in that case as you do in the case of an agreement."

In "Ridout v. Bristow,"[71] where a widow gave a note in which the consideration was stated to be "for value received by my late husband," she was held liable. The case of "Popplewell v. Wilson,"[72] was referred to as having been presented to the court as distinguishable

[69] 14 M. & W., 465 (1845).
[70] 11 Q. B., 854 (1846).
[71] 1 Cr. & J., 231 (1830).
[72] 1 *Strange*, 264 (1719).

on the ground that in that case ther was a promissory note to pay the debt of a living person and, therefore, there was forbearance, which was a good consideration. Bayley, J., does not reject this interpretation of the case, but says that this view does not make it inapplicable to the present question, because there may be a forbearance to the representatives of a dead man as well as forbearance to a man whilst living. Alderson, B., referring to this case in "Searle v. Wentworth," says that the question was, whether, it being expressed on the face of the note that it was given for the late husband's debt, that necessarily showed a want of consideration, and it was held it did not, because the plaintiff's remedy might be delayed against the executor or administrator,[73] and in the case of "Searle v. Wentworth," which came before the Court of Error as "Nelson v. Searle,"[74] the declaration was on a note at twelve months made by the defendant, and the plea was that it had been given for goods sold by plaintiff to Joseph Wentworth, who had died, and to whose estate no administration had been taken out. The court below gave judgment for the plaintiff expressly on the ground that the effect of giving the note, at all events, was to preclude the plaintiff from suing the defendant in case she should afterwards take out administration within a year. But this judgment was reversed on error, and the defendant held not to be liable on the note. Mr. Ames says that this case is distinguishable from others on the ground that the note was not negotiable, and, therefore, not a specialty. But there is no suggestion of reliance on any such distinction in the arguments or the judgment, either in the lower court or in the Exchequer Chamber. In the case where the party was held liable on the note given for the debt of another, the judgment was put on the ground that the existence of a consideration had not been negatived by the defendant, inasmuch as there might be assets, and the taking of the note involved a forbearance or a suspension of the remedy. In this case, there was no administration and "the case stood as that of a stranger giving his note for a debt with which he had no connection. On the whole, it would seem, therefore, that unless some element of

[73] See note Am. Edition, 1 C. & J., 236.
[74] 4 M. & W., 13.

detriment to the promisee or advantage to the promisor can be discovered or suggested. the plaintiff cannot recover on a note given for the debt of a third party, and that the only difference between a note given upon such a consideration and a mere simple agreement is that the note imports a consideration, and as Alderson, B., said in "Searle v. Wentworth," "Ridout v. Bristow," determined that unless the defendant negatives all possible consideration the plaintiff is entitled to recover on the consideration implied in the note itself.

In the Upper Canadian case of "McGillivray v. Keeper,"[75] it was held that promissory note given by A. to B. for a debt due by C. upon no consideration of forbearance and upon no privity shown between A. and C. cannot be enforced. In this case, the debt was payable at a longer credit than the period of the note, and as the note accelerated the payment, there could be no pretence of forbearance and there was no discharge of the debtor. Robinson, C. J., in this case, seems to have inclined to the view that the debt of a third person was a sufficient consideration to support the note, although he doubtfully concurred in the judgment that the plaintiff could not recover. A couple of years later, in "Dickenson v. Clemow,"[76] where plaintiff was suing on a note given by defendant for the debt of a third party, the same judge said, "If Moss Dickenson owes the plaintiff a debt and at the plaintiff's request these defendants choose to give their note for it, I take it such a note is valid and binding upon them and none the less so because the debt of Moss Dickenson was not then due. * * * The only question is, whether a debt due by a third party, but not yet payable, may not form a valid consideration for a promissory note. No authorities have been cited to the contrary. The creditor might well agree to discharge or forbear proceedings against the first debtor, if a third party would give his note for payment of the money at an earlier day."

In "Ryan v. McKerral,"[77] the case was that a note had been made to plaintiff by the defendant's father and mother. Some time after it had been thus completed, and,

[75] 4 U. C. Q. B., 456 (1848).
[76] 7 U. C. Q. B., 421 (1850).
[77] 15 Ont. R., 460 (1888).

for the purpose of the decision it may be said that it was after the note was due, the defendant was pressed by the plaintiffs to sign it on the representation that it was his father's wish that he should do so. There was no other consideration, and the question was thus stated by the Chief Justice: "Can a third party be liable on a note made by other parties and signed by such third party after the note has been a completed note as far as the intention of the parties to it is concerned, or signed by him after it became due without consideration moving directly to the third party, or without there being an agreement on the part of the holder of the note to extend the time of payment?" The question is answered in the negative by the Chief Justice, whose judgment to that effect was read after his decease and adopted as the judgment of the court by Ross and Mahon, JJ.

Note given by way of compromise of an invalid claim.—Mr. Langdell, whose lead Mr. Ames follows in asserting that bill or note is good without consideration, has accounted for one of the cases in which a compromise was upheld,[78] by saying that notes were given in settlement and intimating that if this had not been the case the compromise would not have been upheld, his doctrine being that, "forbearing to prosecute a claim at law is a good consideration for a promise if the claim be well founded, but not otherwise."[79] But there was no suggestion in the case of "Cook v. Wright" of any distinction between the compromise of a claim as consideration for a note and for any other simple contract, and it is well settled by "Callischer v. Bischoffsheim,"[80] that the compromise of a foundationless claim of the plaintiff is good consideration for any promise, whether by note or by ordinary simple contract if the plaintiff bona fide believes that he has a good claim which he means to prosecute. The decision is criticized by Mr. Langdell as alike repugnant to authority and principle, but it is based on considerations of practical convenience and is too firmly established to be further questioned.

[78] *Cook v. Wright*, 1 B. & S., 559 (1861).
[79] 2 [illegible]gdells *Cases on Contracts.* (Summary) 1018.
[80] L[illegible]., 5 Q. B., 449 (1870).

Note given in consideration of a moral obligation.—A moral obligation was thought by Lord Mansfield to be sufficient to support a promise, but it is no longer considered sufficient and no distinction in this respect is made between a promissory note and any other promise. The Nova Scotia case of a note given by the father of the defendant administrator to the plaintiff out of affection and regard for his mother,[81] and the New Brunswick case, in which the defendant gave the plaintiff a promissory note for £150, because she thought a deceased brother, whose property she had inherited, would have left the plaintiff as much if he had made a will, are illustrations of the principle.[82]

Note for subscription to charitable or philanthropic object.—Subscriptions for charitable and philanthropic objects present very much the same question. Mr. Justice Maclaren cites the case of a promissory note to pay the Church Society of the Diocese of Toronto, or bearer, fifty pounds towards providing a fund for the support of a bishop of the Western Diocese of Canada, which was held by Robinson, C. J., to have been given for valuable consideration,[83] and a case is also cited from Michigan to the effect that the accomplishment of the objects of an educational establishment were held to be sufficient consideration for a note.[84]

But in the case of the "Cottage Street Methodist Episcopal Church v. Kendall,"[85] it was held by Gray, C. J., that a gratuitous subscription to promote the objects for which a corporation is established cannot be enforced unless the promisee has in reliance on the promise done something or incurred or assumed some liability or obligation, and it is not sufficient that others were led to subscribe by the subscription sought to be enforced. The subject is one relating to the general law of contract and will not be further discussed here as there is no suggestion in the cases that the validity of the promise in a note would be tested by any different principles from

[81] *Baker v. Read*, 1 N. S. D., 199 (1869).
[82] *McCarroll v. Reardon*, 9 N. B., 261 (1859).
[83] *Hammond v. Small*, 16 U. C. Q. B., 371 (1858).
[84] *Wesleyan Seminary v. Fisher*, 4 Mich., 515 (1857).
[85] 121 Mass., 528 (1876).

those which would determine the validity of any other promise.

Failure of consideration as a defence.—The total failure of consideration is a defence to a note as between the immediate parties, but it is a merely personal defence, and therefore inoperative against a purchaser for value without notice. Mr. Justice Maclaren gives a number of illustrations of the the total failure of consideration. Where, for example, A. appointed B. his executor, and gave him a demand note to compensate him; but B. died before A., and the consideration, therefore, wholly failed. B.'s executors were not allowed to recover on the note.[86] Or where, on a sale of land, there has been a total want of title this constitutes a total failure of consideration.[87]

Distinction where the promisor gets what he bargained for, though valueless.—But there is no failure of consideration where the purchaser gets what he bargained for and discovers afterwards that it is of no value to him. As in "Haigh v. Brooks,"* assuming that the guarantee given up in that case was unenforceable, as it possibly was, nevertheless, the giving up of that which the party who had it might have chosen to retain was consideration for any promise the party desiring it might choose to make. In the same manner it would be no answer to a claim on a note for a patent that the patent was valueless if the maker of the note chose to buy it and pay for it.

Value given at any time makes holder for value as regards acceptor and parties prior to such time.

54. Where value has at any time, been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time. 53 V., c. 33, s. 27. [E. s. 27.]

Value given at any time makes the holder a holder for value as against persons who became parties prior to giving of value.—The draftsman seems to have had in mind, among others, the case where the holder has

[86] *Solly* v. *Hinde*, 6 C. & P., 316 (1834).
[87] *Curtis* v. *Clark*, 133 Mass., 509 (1882).
* 10 *Ad. & El.* 309, 323 (1840).

obtained the bill without giving value. In that case, if value was given by the party from whom he received it or by any prior party to the bill the holder is, by this sub-section, declared to be deemed to be a holder for value as regards the acceptor and all parties who became such prior to the time when such value was given. In one of the cases cited as an illustration by both Chalmers and Maclaren,[88] the acceptor was sued on a bill by an indorsee and pleaded that the bill had been drawn by one McLean at the request and for the accommodation of the defendant, and that it was endorsed by McLean without any consideration or value given by the plaintiff for such indorsement to McLean, or to the defendant, or to anyone whomsoever. It was held that this plea was not issuable. It only alleged that the defendant had received no value and the plaintiff had given none, but it did not allege that none of the previous parties had given value, and if value had b en given at any stage, the holder, under the principle which is embodied in this sub-section, was a holder for value.

The sub-section also points, and perhaps more directly, to a case such as "Burdon et al. v. Benton,"[89] where a bill was accepted by the defendant drawn by the plaintiff, and the plea was not merely that the bill was accepted for the plaintiff's accommodation, but that plaintiffs had never given any value for it. Assuming that the first allegation in the plea was true, it was in proof that the plaintiffs had given their cross-acceptance to the defendant and had been compelled to pay it, and that the other bill accepted by the defendant was due and unpaid at the time of action brought. It was held, therefore, that the value given by the plaintiff to the defendant while the bill was current, was sufficient to constitute him a holder for value. (The cross-acceptance given by the plaintiff was given after the bill sued on was accepted.)

All that is stated here is that where value has been given, the holder is a holder for value against the acceptor and the parties who became such prior to the value being given. The holder is not here said to be a holder for value as against one who has become a party subsequently to the value being given. If the holder gave no

[88] *Hunter v. Wilson* 4 Exch., 489 (1849).
[89] 9 Q. B., 843 (1847).

value, this clause does not make him a holder for value as against his immediate indorser or as against the party who last gave value for the bill.

Lien-holder is holder for value to extent of lien.

(2) Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien. 53 V., c. 33, s. 27. [E. s. 28.]

Lien-holder is holder for value to the extent of lien.— Mr. Ames says that the position and rights of the pledgee of negotiable paper are different from those of the pledgee of an ordinary chattel. "The legal title to a pledge regularly remains in the pledgor, but the indorsement of a bill or note, or the delivery of an instrument transferable without indorsement, by way of collateral security, passes the legal title to the pledgee. Accordingly, the pledgee may maintain an action upon the instrument in his own name, and in such action he is entitled to recover the full value of the paper, although greater than the amount of the debt due from him to the pledgor. But he will hold the surplus for the benefit of the pledgor."[90] It is entirely consistent with this that "a creditor who takes a bill or note from a wrongful transferror, either in conditional payment of or as collateral security for his debt, cannot recover on the paper more than his debt." Mr. Chalmer's illustration given in connection with the same subject might easily be misunderstood. "C., the holder of a bill for 100 pounds, indorses it to D. as a pledge for 50 pounds; D. is a holder for value for 50 pounds, and this is the sum he can recover if he sues C." If, in this case, the pledgee had been suing the acceptor, he would have recovered the whole amount of the note, holding the balance over and above the amount for which it was pledged for the benefit of the pledgor. As to that balance he sues as trustee for the pledgor. If the paper was wrongfully pledged or the acceptor had a good defence as against the pledgor, he could avail himself of it in the action by the pledgee, but as to the amount for which the paper was pledged he would lose the benefit of the defence because of the negotiation of

[90] 1 *Ames Cases on B & N.*, 324.

the bill. The pledgor is a holder for value as to that amount. All this is fully explained by Mr. Chalmers in a note to Article 84 of his first Edition.[91] The discount of a bill must be distinguished from a deposit or pledge of the bill. A discounter is a holder for full value. The position of a pledgee is this: if he sue a third party he sues as trustee for the pledgor as regards the difference between the amount he has advanced and the amount of the bill. If the pledgor could have sued on the bill the pledgee can recover the whole. If the title of the pledgor is defective the pledgee can recover the amount of his advance, provided he took the bill without notice."

Banker has general lien on securities of customers in his hands.—The general lien of bankers on securities is part of the law merchant and to be judicially noticed like the negotiability of bills of exchange or the days of grace allowed for their payment,[92] and it was held to apply in a case where the customers kept three accounts at a bank, a loan account, a discount account and a general account, receiving advances which were entered in the loan account, and to meet which they deposited securities in the bank. In the course of the transaction they deposited bills of exchange with the bank, accompanied by a letter stating that they proposed to draw upon them for £10,500, but, as their credit would not afford a margin to this extent, they sent these bills as collateral security. The loan account was covered by dividends and securities which were held, and the bank claimed to hold the bills for the deficiency in the general account. It was held that the bank could do so under the facts. There was no particular reason for treating the accounts as three distinct matters. It was merely for convenience that the account was kept separately and "in truth, as between the banker and customer, whatever number of accounts are kept in the bank, the whole is really but one account, and it is not open to the customer, in the absence of some special contract, to say that the securities which he deposits are only applicable to one account."

[91] *Chalmers on Bills*, 1st Ed., art. 84, p. 70.
[92] Per Lord Campbell in *Brandao* v. *Barnett*, 3 C. B. at 530.

Special terms of deposit may displace banker's general lien.—It is only in the absence of a special contract that the general lien attaches. The terms on which the securities are deposited may displace the general lien, as in the case where a policy of life insurance was deposited to cover overdrafts to an amount expressly limited by the memorandum of deposit, and it was contended that the bank had a claim to the amount stipulated under the special contract, and a lien for the balance over and above that amount under the implied contract, but it was held that the special contract governed the transaction and displaced the general lien.

Everything may turn on the terms of the special agreement. Where, for example, an accommodation bill was among others sent to a bank by a customer who had been pressed to send up any bills he could "'on account," and at the maturity of the accommodation bill the balance was in the customer's favor, it was held that the banker's lien revested when, upon fresh advances being made, the balance turned in favor of the banker. The bill could have been reclaimed when the debt for which it was given was extinguished at its maturity, but it had not been reclaimed and was held as security "on account," according to the terms of the pledge.[93]

Collateral security for note may be retained as security for renewal note, unless, &c.—Mr. Justice Maclaren states on the authority of a case in the Ontario Appeal Reports that "when a $200 note is deposited as collateral to a discounted note of the same amount it may be retained as collateral to a partial renewal of the discounted note for $175.00, and the latter not being paid, the holder can recover $175.00 from the maker of the collateral note."[94] This, however, depends on the inference of fact to be drawn from the circumstances or from the express terms of the agreement. If the collateral was deposited as security for the debt represented by the original note and that debt was not extinguished but merely suspended by the part payment and renewal, the collateral still stands as security. If the

[93] 1 *Starkie*, 483 (1816).

[94] *Maclaren on B. & N.*, 3rd Ed., 173, citing *Canadian Bank of Commerce v. Woodward*, 8 Ont. A R, 347 (1883).

original debt has been extinguished, or if the collateral was deposited strictly with reference to the original note, as such, it cannot be held as security for the payment of the renewal note. Where the original note has been retained by the creditor the inference is practically conclusive that it is not discharged, but simply suspended by taking the renewal, but it is still an inference of fact and not a conclusion of law. Where, on the other hand, the original note is given up the inference is not conclusive that it has been discharged. The surrender of the original note is evidence only of its being satisfied and discharged, and as such it can, of course, be rebutted, as stated by Boyd, C., in the case referred to. Where the collateral is an accommodation note a further question may arise. If the accommodation note was overdue at the time the renewal note was taken, it may be contended that allowing it to remain as security is equivalent to a negotiation of the note. Now, while it is true that an accommodation note can be negotiated after it is due and the holder who has taken it is a holder for value, if there was an agreement that it should not be negotiated after maturity, that agreement is an equity by which the holder is bound and which may prevent him from holding it as collateral to the renewal note.

Proof by pledgee in the bankruptcy of party liable on bill.—Where the party liable on the bill has become bankrupt, a distinction arises which is not clearly pointed out in the statute. In "ex parte Newton,"[95] the claimant held a bill accepted by the bankrupt by way of accommodation for the drawer and given by the drawer to the claimant as security for the performance of a contract. Less than the amount of the acceptance was due to the claimant under the contract and it was contended for the estate and decided by Bacon, V. C., that the claimant could only prove for the amount for which the bill was held as security, on the principle that he was only a holder for value to that amount, as stated in this subsection. But the Court of Appeal, held that, although the claimant, had he been suing the bankrupt, could only have recovered the amount for which the bill had been deposited, it was different in a case of bankruptcy. He

[95] 16 Ch. D., 330 (1880).

had a right to make the bill available against the acceptor in the way which would best produce the sum for which it was held as security, and he could, therefore, prove in the bankruptcy for the whole amount, but he could only receive dividends for the amount for which it was so held.[96] In this case the claimant had no notice that the bill was an accommodation bill, but it does not seem that it would have made any difference if there had been notice. Accommodation is not one of the equities notice of which prevents the holder from being a bona fide holder for value. When a party accepts for accommodation he means that the party accommodated shall use the bill in such a way as he sees fit for that purpose.

If the defence is based not upon accommodation but upon fraud, it would seem that the claimant's right to prove is precisely the same as a plaintiff's right to sue. He can only prove for the amount for which the bills were held as security.[97]

Bills indorsed to banker pending discount.—Bill. indorsed to a banker pending discount, that is, pending inquiries as to the solvency of the acceptor, the banker meanwhile making some advances to the customer on the credit of the bills, do not come within the principle as to securities. In the event of the bankruptcy of the acceptor the banker is not restricted to proving for the amount advanced, nor is he obliged to value the bills as securities. He can prove for the full amount of the bills and also recover what he can from the other parties to the bills, provided that he does not receive in the whole more than a hundred cents on the dollar of his advances.[98]

Bill held as security against future liability. Duties of pledgee.—The holder of a negotiable bill to whom it has been transferred as security against a future liability on the holder's part for a payee can collect the notes at maturity before that liability arises and hold the proceeds to the extent of the liability.[99] Not only so, but

[96] See quære as to this in *re Gommersall*, 1 Ch. D., 137 (1875).
[97] See in *re Gommersall*, 1 Ch. D., 137 (1875).
[98] *Ex parte Schofield*, 12 Ch. D., 337 (1879).
[99] *Maclaren on B. & N.*, p. 173, citing *Ross v. Tyson*, 19 U. C. C. P., 294 (1869).

like any other bailee, the pledgee of a bill must use due diligence with reference to it, having regard to the peculiar nature of the thing bailed. He must not part with it; he must, if he can, collect it at maturity; if he cannot, he must give the proper notice of dishonour. But his laches in not collecting gives no cause of action to the pledgor, or affords no ground of defence to the debt for which the securities were pledged, as the case may be, unless it is shown as a matter of fact that the pledgor has been injured by the laches of the holder.[100]

Collateral security pledged in fraud of true owners of bill.—Notwithstanding the strong terms in which the statute seems to be drafted, it may yet be an open question whether the holder of the bill deposited with him as collateral security merely is, in all cases, entitled to hold it as against other parties in fraud of whom it has been transferred. If it has been given as collateral security for a present advance, the case is clear and is settled by the decision in "Collins v. Martin et al.",[1] where bills had been deposited by the plaintiff with the Messrs. Nightingale to be got in when due, but in the meantime had been pledged by the Nightingales with the defendant for loans. The action was trover by plaintiff, who claimed that the title had not passed as the transfer had been wrongfully made. But the court said, "for the purpose of rendering the bills of exchange negotiable, the right of property in them passes with the bils. Every holder with the bills takes the property, and his title is stamped upon the bills themselves. The property and the possession are inseparable. This was necessary to make them negotiable, and in this respect they differ essentially from goods, of which the property and possession may be in different persons. The property passing with the possession, it is admitted that a banker who receives indorsed bills from his customers to be got in when due and carried to his account, may discount or sell them. Why may he not pledge them? Either is a breach of the confidence reposed in him. He may sell because the property has been entrusted to him, and he may

[100] *Ryan* v. *McConnell*, 18 Ont., 414 (1889).
[1] 1 B & P., 648 (1797).

pledge for the same reason, for he who has the property has a disposing power and the law has not limited it to be used in any particular manner. Perhaps the confidence reposed in bankers may be abused, and it might be wished that they could be restrained from abusing their trust, but an arbitrary restriction cannot be imposed. Any restriction would probably check the facility of negotiation. As in cases of other property we say 'caveat emptor,' so in this particular case we may say that the customer who prefers to entrust his bankers with his bills and his cash rather than be at the trouble of doing his own business, 'caveat.'"[2]

We shall not stop to notice the curiously inapposite citation of the maxim, "caveat emptor. This maxim would have counselled the pledgee of these bills to whom they were wrongfully transferred to beware lest they should find that the transferror had no title and could confer none. The principle here applied is the very opposite. The "emptor" need not beware at all. It is the owner who must beware lest a purchaser may, by the wrongful conduct of his bailee, divest him of all right and title to his property.

In the case cited, the parties who wrongfully disposed of the bills got a fresh discount on the strength of the pledge of them with the defendant. The defendant, therefore, gave value for them. So it would undoubtedly be if the pledgor received any advantage or consideration valuable in the eye of the law in return for the transfer of the paper. For example, he might secure a delay from his creditor, or a forbearance to press for the payment of an existing debt due to the pledgee from the pledgor, or the pledgee might surrender securities already held in lieu of those newly pledged, or he might, in consideration of the pledge of the securities, incur some liability as surety for the pledgor. The ways in which value might be constituted for the pledge of the securities are infinite, and the rules for the determining of the existence of consideration such as shall entitle the pledgee to the benefit of our proposition as a bona fide holder for value are simply the general rules applicable in all cases for determining the question of consideration or no

[2] 1 B. & P., 648 (1797).

consideration, where its presence is requisite to the validity of a contract.

Where no fresh advance or new consideration given. —Suppose, then, that the pledgee does nothing in return for the pledge of the securities, incurs no new liability, grants no new forbearance or no greater forbearance than he was already prepared to grant to the pledgor, and gives no fresh consideration for the pledge, but merely accepts the bills as collateral security for a debt already due to him from the pledgor. Is he in that case a holder for value and will his title as pledgee defeat that of the original owner or control the equities in favor of the maker or acceptor? For example, if in the case last cited, the Nightingales had got no fresh advance and no added forbearance, but had merely deposited the notes in question as collateral security to strengthen their account with their bankers. Such a case, it may be said, can very seldom occur. It must be seldom indeed, that there will not be a sufficient consideration to afford ground for the application of the principle on which Lord Bramwell was prepared, if necessary, to decide the case of " Leask v. Scott."[3] But there might be a case stated in which the transferee could not pretend that he had given anything in exchange for or suffered any detriment on account of the transfer of the bill, or that he had in any way changed his position or otherwise prejudiced himself in reliance upon the title transferred to him by the pledgor. If we look for equitable considerations there is much to be said for the view that as the pledgee has given nothing for the paper and the pledgor has got nothing that he did not already have, there is no reason why the title of the original owner should be divested or why the party taking the bill should not take it subject to equities and stand simply in the position of the pledgor with respect to it. Mr. Ames so decides, citing a New York case of " Stalker v. McDonald,"[4] affirming a previous case of " Bay v. Coddington et al.",[5] as authority for the principle which he states to the effect that " paper

[3] 2 Q. B. D., 376 (1887).
[4] 6 *Hill*, 93 (1848).
[5] 5 *John*, Ch. 64 (1821).

taken merely as collateral security for an antecedent debt is not taken for value."[6] A long discussion arose in the later case, owing to the fact that in the Supreme Court of the United States, Story, J., in deciding the case of "Swift v. Tyson,"[7] had pronounced a dictum to the effect that the pledgee, under such circumstances, was a holder for value. Chancellor Walworth examined the cases fully and decided that Story's dictum was erroneous. His discussion is altogether too long for citation here; but the earlier case of "Bay v. Coddington,"[8] contains a more concise statement of the reasoning upon which both judgments are based.

In this case, the notes of hand were given to Randolph and Savage for a vessel sold by them on behalf of the plaintiff, who was the owner of the vessel and entitled to the notes. Defendant was under heavy contingent obligations as indorser of the accommodation notes of Randolph and Savage, which were still current when the latter delivered the notes in question to the defendant. There was here no existing debt. There was a contingent liability for the accommodation notes that the defendant had indorsed. Had those notes been retired and returned to the defendants and the notes claimed by the plaintiff been given in lieu of them there would, undoubtedly, have been consideration for the transfer, and the defendants would have been holders for value. It is certainly difficult to see any element whatever in the case that would constitute a consideration for the transfer so as to divest the title of the plaintiff to his property, and Chancellor Kent, accordingly, sustains the claim of the plaintiff on this ground. Referring to the position of the defendant he says, "The notes were not negotiated to them in the usual course of business or trade, nor in payment of any antecedent and existing debt, nor for cash or property advanced, debt created or responsibility incurred on the strength and credit of the notes. They were received from Randolph & Savage after they had stopped payment and had become insolvent within the knowledge of J. & C. Coddington, and were seized upon

[6] 2 *Ames Cases on B. & N.*, 867.
[7] 14 *Curtis*, 166; 16 *Peters*, 1 (1842).
[8] 5 *John*, Ch. 64, N. Y. (1821).

by the Coddingtons as 'tabula in naufragio,' to secure themselves against contingent engagements previously made for Randolph & Savage and on which they had not then become chargeable." Further on he proceeds to say: "I have not been able to discover a case in which the holder of negotiable paper fraudulently transferred to him was deemed to have as good a title at law or in equity as the true owner unless he receives it, not only without notice, but in the course of business and for a fair and valuable consideration given or allowed on the strength of that identical paper. It is the credit given to the paper and the consideration bona fide paid on receiving it that entitles the holder on grounds of commercial policy to such extraordinary protection even in cases of the most palpable fraud. It is an exception to the general rule of law and ought not to be carried beyond the necessity that created it."

In "Swift v. Tyson,"[9] in the Supreme Court of the United States, Story, J., very properly, questions the proposition that, in order to enable the transferee to hold free of equities, the paper must be taken "in the usual course of business"; but proceeds, "we are prepared to say that receiving it in payment of or as security for a pre-existing debt is according to the known and usual course of trade and business. And why, upon principle, should not a pre-existing debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances made upon the transfer thereof; but also in payment of and as security for pre-existing debts."

The reasoning of the New York Chancellor seems to be conclusive, as applied to the case where the bill is taken as mere collateral security for an already existing debt, where it is not shown that the debt was discharged or that some additional forbearance was accorded to the debtor which he would not have enjoyed had it not been for the deposit of the security. The English cases do not seem to raise the question squarely. In "Curry v. Misa,"[10] from which Sir William Anson takes his defini-

[9] 14 *Curtis* 166; 16 *Peters*, 1 (1842).
[10] L. R., 10, Ex. 153 (1875).

tion of consideration, the Court of Exchequer Chamber held that, "a creditor to whom a negotiable security is given on account of a pre-existing debt holds it by an indefeasible title, whether it be one payable at a future time or on demand." But it is one thing to take a negotiable security in payment of an existing debt and another and a different thing to take it merely as collateral security. The creditor who takes a note in payment discharges his debt and agrees to look only to the security which he has taken in payment. Even in cases where the debt is not absolutely discharged, as where the note is that of the debtor himself, the remedy on the debt is suspended during the currency of the note, and there can be no question as to the validity of the consideration. Where the security is taken as mere collateral, there is no payment of the debt, either absolute or conditional, and no suspension of the remedy. In the last edition of Chalmers there is an illustration to this effect drawn from "McLean v. The Clydesdale Bank."[11] "A customer being indebted to his bankers gets a cheque on another banker from a friend for the purpose of reducing the overdraft. The cheque is paid in and credited to his account. The banker holds that cheque for value and can recover from the drawer if he stops it." Here also, the case is one of payment and release "pro tanto" to the customer of the amount covered by the cheque. It may be gathered from Mr. Chalmer's first edition, that his opinion differed from that of Mr. Justice Story, which Mr. Bigelow says has been deliberately reaffirmed by the Supreme Court of the United States, and that his view is in substantial accord with that of Mr. Ames. After stating that the holder who has a lien on the bill is deemed to be a holder for value to the extent of his lien, he proceeds to explain that a bill is "prima facie" presumed to have been negotiated to the holder for value and not to have been pledged or deposited as collateral security.[12] The sharp contrast drawn between a holder for value and the party who has taken the bill as a mere pledge or collateral security is entirely in accordance with Mr. Ames' doctrine on the subject. The act, it is true, provides that valuable consideration for a bill may be

[11] 9 App Ca., 95 (1883).
[12] *Chalmers on Bills*, 1st Ed , p. 70.

constituted by an antecedent debt or liability,[13] but this does not settle the question. It merely enacts as law what was decided in "Currie v. Misa."[14] Of course an existing debt from the maker to the payee is a good consideration for a note, and, as the statute proceeds to say, still following the case of "Currie v. Misa," such debt or liability is deemed valuable consideration, whether the bill is payable on demand or at a future day. But the decision of which this section of the statute is an abstract, was put expressly on the ground that the taking of the note was a conditional payment of the debt and that, even where a cheque payable on demand was taken, the holder might either cash it immediately or hold it over for a reasonable time, and that it could not be said, "that a creditor who takes a cheque on account of a debt due to him, and pays it in to his banker, that it might be presented in the usual course, instead of getting it cashed immediately, does not alter his position and may not be greatly prejudiced if his title could then be questioned, or that the debtor does not, or may not, gain a benefit by the holding over."

Accommodation party defined.

55. An accommodation party to a bill is a person who has signed a bill as drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person.

Liable to holder for value. Immaterial whether holder knew or did not know it was for accommodation.

(2) An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not. 53 V., c. 33, s. 28. [E. s. 28.]

What is an accommodation bill?—Mr. Chalmers says that a bill is not an accommodation bill unless the acceptor, (that is the principal debtor according to the terms of the instrument), is in substance a mere surety for some other person who may or may not be a party thereto, although a bill which is signed by one or more accommodation parties is frequently spoken of as an

[13] Section 53.
[14] L. R. 10, Ex. 153 (1875).

accommodation bill. The distinction, he tells us, is material when questions arise as to what is a discharge of the bill.[15]

Cross acceptances given for mutual accommodation, are not accommodation bills.—Where cross acceptances are given for mutual accommodation, neither of the bills is an accommodation bill. Nor is the bill an accommodation bill where it is drawn against a running account and accepted, although the account may have been against the drawer when the bill was drawn or accepted or payable.

Notice of accommodation bill immaterial.—Notice that a bill is an accommodation bill is of no consequence in fixing the rights of the parties thereto, because it is for the express purpose of lending the credit of his name that the accommodation party places it on the bill. (See as to this note under section 56 [2]).

Holder in due course defined.

56. A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely:—

Must have taken before bill was overdue and without notice of bill having been dishonoured.

(a) That he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact;

In good faith for value and without notice of defects.

(b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it. 53 V., c. 33, s. 29. [E. s. 29.]

Cross reference.—The peculiar rights possessed by a holder in due course as thus defined will be discussed under section 74.

Good faith and notice defined.—All the terms used in this section have been abundantly defined in the preceding sections of the act, with the exception of the terms,

[15] *Chalmers on Bills*, 5th Ed., p. 88. See on this subject note under section 139.

"good faith" and "notice." The rights conferred upon the holder in due course, who, before the passing of the act, was usually called a "bona fide holder for value without notice," are conditioned among other things, as the latter phrase imports, upon his having taken the bill in good faith, and without notice of any defect in the title of the party who negotiated it.

The conditions of bona fides and want of notice cannot be separately discussed. If they are not actually inseparable the two conditions glide into one another so that in most cases, if not in all, it is impossible to distinguish them. If a party takes with notice of defects in the title of his transferror, he cannot be a bona fide holder. It is conceivable that he may be a mala fide holder and yet be without actual notice of defects.[15a]

It was at one time contended that, in order to entitle a transferee to these peculiar rights, he must shew that he had exercised due care and caution in dealing wih the instrument, or, to speak more accurately,—for the burden was not, of course, upon the holder,—it was contended that the transferee under such circumstances was under some special duty to use care and caution, and that his title could be defeated if he could be shewn to have made no enquiries as to the title of his transferror. Lord Mansfield suggests this limitation in his judgment in "Miller v. Race"[16], where the title of a bona fide transferee of a bank note which had been obtained by robbery from the mails, came in question. The note was for £21.10, and Lord Mansfield suggested that if it had been a note for £1,000 it might have been suspicious. His suggestion became a rule of law in the hands of Lord Tenterden who laid down the principle that, although the holder had given value for the bill or note, yet if he took it under circumstances which ought to have excited the suspicions of a prudent and careful man, he could not recover."[17] The rule so established by Lord Tenterden was held to for ten years, but not without mutterings of complaint, till at length it was set aside in favor of a better rule which has remained law to this day. Mr. Daniel quotes from Lord Campbell's

15a See next following note.
16 1 *Burr.*, 452 (1758).
17 *Gill* v. *Cubitt et al*, 3 B. & C., 696 (1824).

Lives of the Chief Justices as follows: "Lord Tenterden's rule died with its author. It was soon carped at. Some judges said that fraud and gross negligence were terms known to the law, but of circumstances which ought to excite suspicion there was no definition in Coke or Cowell, and the complaint of the bill-brokers resounded from the Royal Exchange to Westminster Hall, that they could no longer carry on their trade with comfort or safety."[18] The complaints were reasonable. The rule was calculated to hamper the circulation of negotiable paper. It exposed the purchaser to the risk of losing his security, although he had taken it in good faith and paid full value for it, because a jury might differ from him in their judgment as to what degree of enquiry a prudent and careful man should have made before purchasing or otherwise becoming the transferee of such an instrument. The law of Lombard Street ultimately triumphed over the law of Westminster Hall, and Lord Tenterden's rule was finally set aside by Lord Denman, C. J., in the case of "Goodman v. Harvey,"[19] with the facts of which it is not necessary to trouble ourselves at present. Lord Denman said: "The question I offered to submit to the jury was whether the plaintiff had been guilty of gross negligence or not. I believe that gross negligence only would not be a sufficient answer where a party has given consideration for the bill. Gross negligence may be evidence of 'mala fides' but it is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where a bill is passed to the plaintiff without any proof of bad faith in him there is no objection to his title."

A note of this interesting fluctuation of opinion is given by Chalmers under article 86.[20] Discussing the test of bona fides he says, "this varied greatly. Previous to 1820 the law was much as at present, but under the influence of Lord Tenterden due care and caution was made the test." This it was that caused the wails of the bill-brokers to resound from the Royal Exchange to Westminster Hall. "In 1834 the King's bench held that

[18] *Daniel on Negotiable Instruments*, Sec. 733. Note, 5th Ed., p. 761.
[19] 4 *Ad. & El.*, 870 (1836).
[20] *Chalmers on Bills*, 1st Ed., p. 73.

nothing short of gross negligence could defeat the title of a holder for value. Two years later, Lord Denman states it as settled law that bad faith alone could disentitle a holder for value. Gross negligence might be evidence of bad faith, but was not conclusive of it. This principle has never since been shaken in England, and it seems now finally established in America." Hence, defining notice, he says: "Notice means actual notice; that is, either knowledge of the facts or a suspicion of something wrong combined with a wilful disregard of the means of knowledge. If, as a fact, a bill is taken for value and without notice, it is immaterial that the holder took it under circumstances which shew gross negligence." This is now the settled doctrine of English law, and has been so since 1835. But although the doctrine of "Goodman v. Harvey" has ever since been recognized as sound, the Bills of Exchange Act has adopted a different rule from that which was applied to the particular facts in that case. There the bill had been dishonored by non-acceptance, and bore the notarial mark of dishonor on its face when presented to the plaintiff for discount. Lord Denman, at nisi prius, was of the opinion that the plaintiff had been guilty of gross negligence in taking the bill, "with the death wound apparent on it," and the jury, in answer to a question of the Lord Chief Justice, said that in their opinion the notary's marks on the bill were sufficient notice to an indorsee of non-acceptance. But, after argument, his Lordship, delivering the judgment of the court, held that "the evidence in this case as to the notarial marks could only weigh as rendering it less likely that the bill should have been taken in perfect good faith." It was still necessary that the verdict of the jury should pass upon the question of good faith, and, as they had not given a verdict, the plaintiff having been non-suited, the rule was made absolute for a new trial. In two previous cases it had been decided that the party who took a bill bearing the notarial marks of dishonor was not a bona fide holder. The case of "Goodman v. Harvey" is apparently in conflict with these cases, although Mr. Ames says there is no conflict between them. The question is now of no importance, as the statute has made a rule to the following effect:

72. "Where a bill which is not overdue, has been dishonored, any person who takes it with notice of the dishonor takes it subject to any defect of title attaching thereto at the time of dishonor; but nothing in this section shall affect the rights of a holder in due course.

Strictly speaking, the case of "Goodman v. Harvey" is not necessarily overruled by this provision of the statute, for the statute still leaves it an open question what constitutes notice of the dishonor of the bill, and the very question in "Goodman v. Harvey" was whether the notarial marks were sufficient notice of the dishonor to prevent the holder from being a holder in good faith. But there can be little doubt that where the bill bears the notarial marks of dishonor by non-acceptance the holder who takes such a bill will be held to have notice of the fact of dishono and that taking the bill with such notice he will be held to be in the same position as if the paper were taken overdue, and will take subject to equities.

Difference between "mala fides" and honest blundering.—It has just been said that while a transferee with notice cannot possibly be a "bona fide" holder, it is possible that a holder may be a "mala fide" holder, and yet be without actual notice. In "May v. Chapman,"[21] Parke B. said: "I agree that notice and knowledge means not merely express notice, but knowledge, or the means of knowledge, to which the party wilfully shuts his eyes"; and in "Jones v. Gordon,"[22] Lord Blackburn, while stating the rule as to "mala fides" and notice entirely in accord with the ruling of Lord Denman in "Goodman v. Harvey,"[*] said: "If a man, knowing that a bill was in the hands of a person who had no right to it, should think that perhaps the holder had stolen it, when in truth the latter had obtained it by false pretenses, I think he would be taking it at his peril. But such evidence of carelessness or blindness might, with other evidence, be good evidence upon the question, which appears to me to be the real one, whether he knew that there was something wrong in the bill. If he was, so to speak, honestly blunder-

[21] 16 M. & W., 361 (1847).
[22] 26 W. R., 172; 2 Ap. Ca., 616 (1877).
[*] 4 *Ad. & El.*, 870 (1836).

ing and careless, he would not be disentitled to recover; but if it appeared that he must have had a suspicion of something wrong, and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his secret mind, 'I suspect there is something wrong, and if I ask questions it will be no longer suspecting, but knowing, and then I shall be unable to recover,' I think that is dishonesty."

Holder in due course must have become holder before having notice of defects. Check transferred without indorsement, afterwards indorsed, but with notice to holder meantime of defective title.—In order to be a holder in due course he must have become a holder before receiving notice of defects. In "Whistler v. Forster,"[23] a cheque payable to the order of the payee was given to the plaintiff in payment of a debt, but it was not endorsed. The party to whom a cheque is so given has a right to have the indorsement of the payee, but where it is given without indorsement it only gives the transferee such rights as the transferror had in the instrument. In this case, the payee had fraudulently obtained the cheque, and the transferee therefore took it subject to the rights of the defrauded party. Had he taken it with an endorsement he would have been a holder in due course, and would have taken better rights than those of his transferror, as will be explained under sec. 74. Before he got the indorsement he had notice of the fraud, and was, therefore, held to take subject to the right of the maker of the cheque to avoid the transaction for fraud.

Bill must be complete and regular on the face of it.—The bill must be complete and regular on the face of it to enable the transferee to become a holder in due course. An undated bill is not invalid, but it is not regular, and the party who takes it cannot claim the rights of a holder in due course. On the other hand, there is nothing irregular about a post-dated cheque. It is, in effect, a bill of exchange payable at the time it bears date.

Notice to principal is notice to agent, and vice versa, except, etc.—Notice to the principal is notice to the

[23] 14 C. B. N. S., 243 (1863).

agent, and notice to the agent is notice to the principal subject to the proviso[24] that where the agent is himself a party to the fraud he is not to be taken to have disclosed it to his principal, and where a bill is negotiated to an agent and notice is given to the principal, or "vice versa," there must be a reasonable time for communication.

Word "renewal" erased; held no notice of any defect.—The fact that a note bore upon it the word "renewal" which had been erased, the note having been tendered for discount and refused for want of another indorser, was held not to be notice of anything which would disentitle the holder, to whom it had been transferred in payment for goods sold.[a] On the other hand, where two notes were held on which had been endorsed the words, "The within note not to be sold," the word "not" having been erased on one of them, and the whole indorsement torn off the other, but without destroying any part of the face of the note, it was held that the plaintiff who had taken them for value and before their maturity, could not recover.[b] Mr. Justice Maclaren[c] gives this case as an illustration under this section, but it does not seem to have been discussed as a question of notice or good faith. With or without notice, the indorsee of these bills could not recover on them. They had been materially altered, and the alteration of a bill, if material, is not a merely personal defence the benefit of which may be lost by the transfer to a bona fide holder without notice, but a real defence, which avoids the bill even in the hands of a holder in good faith.

Title is defective because of fraud, duress or other unlawful means, illegal consideration, breach of faith etc.

(2) In particular the title of a person who negotiates a bill is defective within the meaning of this act when he obtained the bill, or the acceptance thereof, by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud. 53 V., c. 33, s. 29. [E. s. 29.]

[24] *Chalmers on Bills*, p. 81.
[a] *Larkin* v. *Wiard*, 5 U. C. O. S., 361 (1838).
[b] *Swaisland* v. *Davidson*, 3 O. R., 320 (1883).
[c] *Maclaren on B. & N.*, 3rd Ed., 179.

Personal defences distinguished from real defences.—This sub-section contains an enumeration of a variety of possible defects of title which the defendant might rely upon as personal defences. The clause is confined to personal defences, as it is only with respect to them that the questions as to good faith, notice, transfer before maturity, completeness and regularity of the instrument with which the section deals, can be raised. A real defence is available no matter whether the holder has notice or not, no matter whether the instrument is perfect and regular, or otherwise, no matter whether the transfer is before or after maturity. A personal defence does not attach to the "res." It is good as between the original parties to the note or bill, but it ceases to be available on the document coming before its maturity into the hands of a holder for value without notice of the defence.

Note held subject to a trust or for a special purpose; personal defence.—If the note is held subject to a trust in the hands of the transferror, or for a special purpose only, and is transferred in breach of the trust, or in fraud of the purpose for which it is held, the indorsee who gives value for the note, and has no notice of the breach of trust, has a perfect title, and the antecedent parties have no defence to his action.

Bill or note obtained by fraud; personal defence.—Nor is it any defence that the note or bill was obtained by fraud. In one of the cases already cited, it will be remembered that Ashurst J. said, "No title can be derived through the medium of a fraud or forgery." This is, of course, loose language, as there is all the difference in the world between a fraud and a forgery. Even as to a forgery, the defendant may be estopped from setting up the defence if his negligence has facilitated it. This was held in the case of "Young v. Grote,"[25] and while that case has been practically overruled, the principle on which it is founded remains unshaken. But where the case is one of fraud merely, it is not necessary to invoke the principle of estoppel.

[25] 4 *Bing.*, 253 (1827).

Fraud is one of the defences that cannot be set up against a bona fide holder for value without notice taking before the maturity of the bill.

Bill or note given under duress, or under influence; personal defence.—The same thing is true as to duress. It is no defence for the maker or acceptor that he was compelled by duress or undue influence to sign a note or accept a bill if the instrument has come into the hands of a holder in due course.

Illegality of consideration a personal defence.—Illegality of the consideration is also only a personal defence. In some special cases the statutes have been so framed as to absolutely avoid the note or bill given on illegal consideration, and in those cases, of course, the bill would be void even in the hands of a bona fide holder for value; but there are few if any such cases in this country now. In most if not in all cases of illegality the statute does not absolutely avoid the instrument, but its effect is that the illegality renders the security bad in the hands of the party to whom it was given or any subsequent holder with notice or without consideration, but leaves it good in the hands of a holder in due course.

Release before maturity is a personal defence.—A release of the bill or note before maturity is also a personal defence only. Nothing is easier than to release the obligation of any party to a bill of exchange or promissory note, as we shall presently see,[26] but a release before maturity, while a good defence in an action between the parties, is no defence at all to a bill which has come without notice of the release into the hands of a bona fide holder before maturity. In "Dod v. Edwards,"[27] the defendant relied on a release made in October of a bill due in November. Lord Tenterden said: "You must shew that the plaintiff knew of it. If you cannot shew that the plaintiff was aware of the release, your defence fails. If it were not so, it would put an end to the circulation of bills." Brougham, as

[26] See comment under section 56 (2).
[27] 4 *Bing.*, 253 (1827).

counsel, argued that "the party by the release puts all right out of himself." But Lord Tenterden insisted, "It is quite clear that you must bring it home to the plaintiff."

Payment before maturity is a personal defence only.—Payment before maturity is on precisely the same footing as release before maturity. In "Burbridge v. Manners,"[28] a note given by the defendant was paid before it was due, and was afterwards indorsed by another party, and finally transferred to plaintiff before it was due. Lord Ellenborough, dealing with the plea of payment, said: "Payment means payment in due course. Had the bill been due when it came into plaintiff's hands he must have taken it with all its infirmities. In that case it would have been his duty to enquire minutely into its origin and history. But receiving it before it was due there was nothing to awaken his suspicion. I agree that a bill paid at maturity cannot be re-issued, and that no action can be afterwards brought upon it by a subsequent indorsee. The payment before it becomes due, however, I think, does not extinguish it any more than if it is simply discounted. A contrary doctrine would add a new clog to the circulation of bills of exchange and promissory notes, for it would be impossible to know whether there had not been an anticipated payment of them." Payment before maturity is, therefore, a personal defence only. As to payment at or after maturity no question can arise. It is, of course, a defence between the immediate parties, and, as the note or bill in the case supposed is negotiated after maturity, the holder by virtue of such a negotiation takes subject to all defences. In other words, there can be no bona fide holder. To state the matter in a slightly different way, the holder who takes the bill overdue is conclusively presumed to have notice of all the defences to which it is subject.

Accommodation. Is this a defence, either real or personal?—No mention has been made of the defence that the bill was an accommodation bill, either as a real

[28] 3 *Camp.*, 193 (1812).

or as a personal defence; that is, as a defence available against any holder whatever or even as a defence which could be set up against a holder with notice, or who has taken the bill when overdue. Of course, if a bill or note is given solely for accommodation and is indorsed over without consideration the indorsee cannot recover upon it any more than the original payee, as the defence of no consideration would be complete. But the question is whether, where value has been given for the bill, and it has been taken when it is overdue, which is equivalent to its being taken with notice that it was only an accommodation transaction, the holder can recover from the acceptor or maker who got no value for the instrument. Now the person who lends his name for the accommodation of the payee of a note, or of the drawer or payee of a bill, certainly does not intend to incur a liability for an indefinite period. He intends and expects that the note will at maturity be paid, and it would be perfectly reasonable that he should not be held liable to a party who takes the note or bill overdue. This reasoning is well presented by the Court of Appeal of New York, in "Chester v. Dorr,"[29] where the action was against an accommodation indorser, and Woodruff J. used the following language: "But the very term of payment contained in the note imports that the accommodation party undertakes that the note shall be paid at its maturity, and that he who then holds the note shall have recourse to him if it be not then paid. Where the accommodation, as in the present case, is by indorsement that is the precise contract; viz., that the note shall be paid at maturity and not that it shall be paid at any future time. If the note be not paid at maturity the contract is broken; and if he who then holds it can recover thereon, then his right of recovery may be transferred to another: and the recovery of the latter will be, not because the accommodation indorser undertook that the note should be paid to him, or should be paid at some date after it was due, but because a valid cause of action existing in favor of the holder at maturity has been transferred to him. It is not according to the intent or meaning of an indorsement for another's

[29] 41 N. Y., 279 (1869).

accommodation to say that the indorser intends to give the use of his credit for any other period than that limited in the note, or that such an indorsement imports authority to use it when that period has elapsed. One may be willing by indorsement to guarantee the solvency of another for sixty days or for six months, and yet he would wholly refuse to do so for a period of two years. And, accordingly, when such accommodation is given, it is a most material circumstance that the time during which the borrower is at liberty to obtain credit on the note is fixed by the limitation of the time of payment therein. I deem the just view of the subject to be that when a note has become due and is dishonored, the rights and responsibilities of the parties thereto are fixed. The note then loses the chief attribute of commercial paper. It is no longer adapted to the uses and purposes for which such paper is made, and in respect of which it is important that it should circulate freely. And thereafter he who takes it takes it with knowledge of its dishonor, with obvious reason to believe that there exists some reason why it was not paid to the holder, and takes it with just such right to enforce it as such holder has, and no other."

This reasoning is in great part as applicable to the case of a maker or acceptor as it is to that of an accommodation indorser, but it does not seem to be English law. The statute is not as explicit on the subject as it might be. The section which deals with the subject has already been commented on and is in the following terms:

55. An accommodation party to a bill is a person who has signed a bill as drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person.

2. An accommodation party is liable on the bill to a holder for value, and it is immaterial whether when such holder took the bill, he knew such party to be an accommodation party or not.

In his first edition Mr. Chalmers was perfectly clear. He said, in explanation of the article dealing with the subject of overdue paper and the defences to which it was held subject, "mere absence of consideration is not an equity which attaches to a bill," that is in the hands

of one who takes it overdue, and in a note to this explanation he added: "The rule laid down seems obvious. Notice that a bill is an accommodation bill is not a defence against a holder for value before maturity. Why, then, should the fact be a defence afterwards?"[20] It is not necessary to expand this reasoning, but it may fairly be said that it is not conclusive, although it is precisely the line of reasoning adopted by Coltman, J., in "Sturtevant v. Ford."[21] Notice that a bill is an accommodation bill is no defence against a party who takes it before maturity, for the good and obvious reason that this was the very contract that the accommodating party entered into. The obligation to see the bill paid at maturity was the very obligation that he intended to assume, and but for his assuming which the plaintiff might not have been willing to discount the note. But it does not follow from this that he should be held liable on a negotiation of the bill after maturity, because it is not clear that he ever meant to assume any liability on such a negotiation. It would have been perfectly rational to have held that he was not liable on such a negotiation. The subject is further considered in the next following note.

Agreement not to negotiate accommodation bill after due is a personal defence.—It is good law that if there be an agreement, express or implied, not to negotiate an accommodation bill after maturity, the agreement constitutes an equity which attaches thereto, and such agreement would be a perfect defence against an indorsee who took an accommodation bill after maturity. It would not have been going too far to have implied such an agreement in every case of accommodation paper; but the point has, after much controversy, been determined otherwise, and Mr. Chalmers embodies the English rule in the following emphatic illustration: "A bill payable three months after date is accepted to accommodate the drawer. After the bill is overdue, the drawer indorses to C. for value. C. can recover from the acceptor."[22] The illustration is founded on the case

[20] *Chalmers on Bills*, 1st Ed., pp. 108, 109.
[21] 4 M. & G., at p. 103 (1842).
[22] *Chalmers on Bills*, 6th Ed., p. 119.

of "Stein v. Yglesias,"[33] which was not very carefully reasoned, and was merely a decision giving leave to the defendants to amend. But the proposition for which this case is cited is laid down in the subsequent case of "Sturtevant v. Ford,"[34] and recognized as sound law by Malins, V. C., in "ex parte Swan."[35] It is, therefore, probably too late to question it. It is true that all the cases referred to were prior to the Bills of Exchange Act, but there is nothing in that act to suggest that it was intended to change the law.

Right of set-off is not a defence against a subsequent holder.—A right of set-off is not an equity attaching to the bill in the hands of a holder with notice, or after maturity. In "Burrough v. Moss,"[36] the defendant had given a note to a married woman, which was indorsed to the plaintiff, overdue. Defendant set up three items of set-off, as to one of which it was held that it was a just claim against the husband, and that had he been plaintiff, the defendant would have been entitled to the benefit of it in the action. The question was, therefore, whether the right to this set-off was one of the equities subject to which the plaintiff must be taken to have held the note, as it was indorsed to him after maturity. Bayley, J., was not at all sure about the matter, and Parke, B., said that when the question of set-off was first mentioned he had thought it must be allowed; but he was now in doubt, and thought the point questionable enough to require further consideration, which was given, with the result that on a subsequent day, Bayley, J., delivered the judgment of the court, and said, "the impression on my mind was that the defendant was entitled to the set-off, but, upon discussion of the matter with my Lord Tenterden and my learned brothers, I agree with them that the indorsee of an overdue bill or note is liable to such equities only as attach to the bill or note itself, and not to claims arising out of collateral matter." This principle has ever since been well established. It was carried a point further in "Oulds v. Har-

[33] 1 C. M. & R., 565 (1834).
[34] 4 M. & G., 101 (1842).
[35] L. R. 6 Eq., at p. 359 (1868).
[36] 10 B. & C., 558 (1830).

rison,"[37] which at first blush seems a rather startling case. Defendant had a betting agent, named Bennett, who laid a number of bets on horse races, and lost them. He was not bound to pay the debts, but he did so, and defendant accepted a bill of exchange in repayment of the sums so paid, which was indorsed to the plaintiff. The case came up on demurrer to the fifth and sixth pleas, the former of which it is not worth while to notice, since the case of "Burrough v. Moss." The sixth plea was that, after the bill of exchange was due, and before Bennett indorsed it to the plaintiff, Bennett was indebted to the defendant in a sum exceeding the amount of the bill and interest, and Bennett, in order to deprive the defendant of his right of set-off, did, in order to defraud the defendant, and in collusion with plaintiff, indorse the bill to the plaintiff to enable the plaintiff to sue the defendant on the bill without any consideration for the indorsement, and that the plaintiff sued merely as agent of Bennett, and in collusion with him. That would seem at first sight to be a reasonably good defence, but the court, after full consideration, held the plea to be bad. They say, Parke, B.: "Notice of the existence of the set-off to the holder of the bill at the time it was due makes no difference, as was settled in "Whitehead v. Walker," unless, indeed, express notice was given to the party liable, and evidence of acquiescence in it, such as would amount to proof of an agreement to set-off by both parties, which would be a satisfaction of the bill, independently of the statutes of set-off. This being clearly settled, what is the effect of an indorsement of an overdue bill under the circumstances mentioned in the plea? These, though inaccurately stated, we think amount to an averment that both the indorser and indorsee, knowing that there was a debt due to the defendant which would be set-off if the action should be brought by the indorser against the defendant, in order to defeat the set-off, and fraudulently, so far as that was a fraud, but no further, agreed that the bill should be indorsed, and it was, therefore, indorsed without value to the plaintiff." As to this alleged fraud, they ask: "Is it really a fraud? though called so. We think it is no fraud. The holder is

[37] 10 Exch., 572 (1854).

under no legal obligation to allow the debt to be set-off against the claim on the bill, unless he has entered into a contract to that effect with the defendant, which contract would create an equity attaching to an overdue bill." Here there was no such agreeemnt proved and the defence was not available. The decision seems a little strong, on first impression, but, after all, it was no defence that the bill had been indorsed to the plaintiff without consideration. That circumstance does not affect the holder where the defendant has received value. Then, if the plaintiff has established his right to recover, the set-off is no defence. As to the pretended fraud, it simply amounts to this, that Bennett had transferred to the plaintiff, as he had a perfect legal right to do, and had thereby deprived the defendant of a certain procedural advantage which he would otherwise have enjoyed.

Agreement for a set-off would be a personal defence.— The case cited, "Oulds v. Harrison,"* suggests circumstances under which the set-off might be an equity. If the holder had entered into an agreement that a debt due by the payee was to be a set-off to the bill or note, that would be an agreement subject to which the holder, by an indorsement after maturity, would take the bill. The defendant might be perfectly willing to accept the bill with the understanding that it was to be subject at maturity to a set-off due to the acceptor. The cases as to this are entirely analogous to those respecting accommodation, which hold that the fact that a bill is an accommodation bill is not an equity, but that this fact, coupled with an agreement that the bill should not be negotiated after maturity, does constitute an equity attaching to the bill.

In "Holmes v. Kidd,"** the acceptance was for money advanced to the defendant by Caleb Watson, with whom the defendant deposited a policy of life insurance and a lot of canvas, which the lender had power to sell and appropriate the proceeds to the payment of the bill. The bill was indorsed overdue and the canvas was sold after the indorsement—so that at the time plaintiff got his title there was nothing that could be set-off. Plaintiff, of

* 10 Exch., 572 (1854).
** 3 H. & N., 891 1858).

course, emphasized this point. "At the moment of the indorsement a perfect title vested in the plaintiff. That could not be affected by anything the drawer might do after the bill left his hands." But the court did not agree to this. Erle, J., said: "We are all of opinion that the plea is good and therefore the judgment must be affirmed. The plaintiff took the bill subject to the equities affecting it. In the hands of the drawer the right to sue was defeasible. When he sold the canvas it was defeated, and the plaintiff took the bill subject to that contingency." And so says Williams, J., "I agree that when it is said that the indorsee takes subject to equities, the equities must arise out of the original transaction out ofwhich the bill arose." The agreement in this case was that the sale of the canvas should operate as a payment of the bill, and the indorsee took subject to that agreement.

Pending action is not a defence, but merely ground for an application to the court.—In this connection, Mr. Ames has a case[40] which raises the question whether a a party who has brought an action on a bill, overdue of course, can transfer to a party having notice of that fact, or can transfer at all, seeing that the negotiation overdue is itself equivalent to notice. The bill was drawn by Levy in favor of himself and defendant and was declared on as indorsed to plaintiff, but as a matter of fact it was first indorsed to a party named Aaron. The plea was that Aaron had brought action on it and afterwards indorsed it to plaintiff with notice of the action brought. The plea was lengthy and elaborate and was held by the court to be inartificial, but the court understood it to raise the question squarely, whether it is a defence that an action on the instrument is pending and that the transferee suing in the second action has notice of the fact? Lord Cockburn says: "The point intended to be raised is, therefore, that the holder of the bill who has brought an action on it cannot transfer it to another indorsee for value so as to enable him to sue if the indorsee had notice of the pendency of the former action. That is a proposition to which I am not prepared to assent." He follows with a somewhat brusque sugges-

[40] *Deuters v. Townsend*, 5 B. & S., 613 (1864).

tion that the acceptor can prevent a second action by paying the bill, which is all very well; but if he cannot pay the bill it seems hard that it can travel through half a dozen hands and leave each with a right of action against the defendant. He proceeds: "Suppose, however, he does not" (pay it) "and an action is brought by the second indorsee, what is his remedy? The answer is that two courses are open to him. He may pay the bill and plead a plea 'puis darrein continuance,' although there might be an inconvenience on the score of costs. But he has another very simple remedy. He may come to this court for its intervention, because in justice and equity when the bill has been transferred the new action is equivalent to an abuse of its process, which the court will not allow. That is a much better and simpler course than talking about equities." Lord Blackburn goes even further than Lord Cockburn in the same direction. He says: "Suppose the plea had stated, what I imagine was intended, that Aaron, after he commenced the action, indorsed the bill to another for an oppressive purpose, still the plea would not be good. The holder of a bill may indorse it, and, if overdue, the indorsee takes it with the equities upon it. But I never heard that an indorsee takes a worse title than his indorser." He proceeds to discuss and criticize the dicta that seem to be opposed to this, chiefly that in Byles on Bills—"that if the indorsee takes a bill with notice that an action is pending, it is a defence for the acceptor," which he says, if it means that the defence is pleadable in bar, is contrary to principle. He successfully explains away all the cases and even questions the suggestion that an averment of oppression would make any difference—"for you cannot introduce an averment that an action was brought with a view to oppression; but it is a very good ground for an application to stay proceedings on the first action."

Judge Chalmers has very little to say on the subject. He says merely—"The fact that an action has been brought on a dishonored bill does not determine its negotiability; but if the bill be transferred after action brought to embarrass the defendant, his remedy is by application to the court,"—which is a mere echo of Lord Cockburn's judgment in "Deuters v. Townshend." (Supra.)

In the latest edition of Byles on Bills, we still read

that—"the holder cannot transfer after action brought so as to enable his transferee to sue also, provided the latter were aware that the action had been commenced." So stands the text, although the matter had all been gone over and the cases discussed and analysed and this very dictum dealt with by Lord Blackburn in "Deuters v. Townshend." In a foot-note in fine print is tucked away the effect of the decisions, after referring to the exploded cases relied on by the defeated party in "Deuters v. Townshend." "But it should seem from a recent decision in the Queen's Bench that this defence could not be raised by plea, and that the defendant's course was to apply to the equitable jurisdiction of the court, although Baron Alderson, in 'Jones v. Lane,' seems to have thought otherwise."[41]

Judgment on a note is no defence to the action of a subsequent indorsee.—In "McLennan v. McMonies."[42] the head-note reads: "It is no defence to an action by endorsee against the maker of a note that a prior endorsee while the holder, and before the plaintiff took it, recovered judgment against defendant and the payee." The note was made by the defendants to the order of Tisdale & Co., by whom it was indorsed to the Bank of Montreal as discounters. The plea was that the bank had sued on the note and recovered judgment against the defendant makers and Tisdale & Co. the indorsers, and that the note was transferred after it was overdue and after the recovery of the judgment. On demurrer to this plea, judgment was given for the plaintiff.

Mr. Daniel's statement is not in accordance with this case. He says,[a] "As between the parties thereto, a judgment on a bill or note operates as a merger of the indebtedness, and while other parties to the instrument may be sued upon it, the one against whom the judgment has been obtained is liable only under such judgment. The judgment extinguishes the bill or note as to the judgment debtor, but is no satisfaction so as to discharge other parties till paid." In "Woodward v.

[41] *Byles on Bills* 16th Ed. 203.
[42] 23 U. C. Q. B., 114 (1863).
[a] 2 *Daniel on Neg. Inst.*, 5th Ed., s. 1284, p. 304.

Pell,"[b] the declaration was on a bill drawn on and accepted by the defendant, and it appeared that the bank had recovered judgment against the defendant on March 3rd, 1866, and issued execution on the 6th. Afterwards one of the indorsers, who had been sued, paid the amount of the bill, but not the costs. It was assumed by the court that if he had paid the costs he would have been entitled to possession of the bill, and would have had a right of action at once against the defendant. Notwithstanding the non-payment of the costs, and the lien of the bank therefor, the indorser who paid the amount of the bill was treated as the holder of the bill, and the plaintiffs as his transferees, who were held entitled to recover. The arrest of the defendant in execution by the bank, after the transfer to the indorser, and his subsequent discharge, were also held not to affect the right of the indorser or the plaintiffs. The case seems to be in accord with "McLennan v. McMonies" (supra), and opposed to Mr. Daniel's statement, as well as to the statement of Judge Chalmers that, "if judgment were obtained, the bill would be extinguished by merger as between the defendant and the plaintiff, or any subsequent party."[c]

Is the enumeration of personal defences in the statute exhaustive?—Judge Chalmers, who is the author of the enumeration of personal defences contained in the statute, questions whether it is exhaustive and proceeds with a caveat to the effect that a person whose title is defective must be distinguished from a person who has no title at all, and who can give none, as, for instance, a person making title through a forged indorsement.

Transferee from a holder in due course whether for value or not acquires all the rights of that holder.

57. A holder, whether for value or not, who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder. 53 V., c. 33, s. 29. [E. s. 29.]

[b] L. R., 4 Q. B., 55 (1868).
[c] *Chalmers on Bills*, 5th Ed., p. 118.

The principle embodied in this section has been drawn from the analogies of equity jurisprudence. Mr. Ames refers[44] to a number of cases where purchasers with notice of incumbrances were allowed to shelter themselves under the rights of prior purchasers without notice. This principle has been applied to the holder of a negotiable instrument. In "Chalmers v. Lanion,"[45] the second indorsee sued the acceptor on a bill. The defence was that the bill had been accepted for a debt contracted in a smuggling transaction and was therefore founded on an illegal consideration. We have seen that this is a personal defence, good between the immediate parties, but of no avail against a holder in due course. The bill was endorsed to the plaintiff after it was due, which we have also seen is equivalent to notice of any defect in the title. But, in this case, there had been a previous indorsement before the bill came due to a party who had no notice of the illegality of the consideration and who gave value for the bill. Had he been suing upon it the defence could not have been set up. He was a holder in due course and the defence was only a personal defence. The present plaintiff had to be considered as having had notice. He had taken the bill overdue. But, notwithstanding that fact, he was held entitled to recover. Lord Ellenborough held that if the plaintiffs received the bill from a person who might himself have maintained an action upon it, the circumstance of the indorsement to them having been made after the bill became due was insufficient to let in the proposed defence, and on motion for a new trial, the other judges of the King's Bench declared themselves of the same opinion. The principle of this case is now embodied in this section of the act.

Can holder, with notice of defects, transfer to one having no notice, and by retransfer to himself acquire the rights of the transferee as holder in due course?—The statement of the law contained in this clause is not complete. Consider the case of one who finds himself in the predicament of a holder with notice of a personal defence, such as fraud or illegality of the consideration, but who, "is not himself a party to any fraud or illegality affect

[44] 1 *Ames*, 692, note.
[45] 1 *Camp.*, 383 (1808).

ing it." Can he transf-- the bill to another who has no notice and who becomes, therefore, a holder in due course, and then take back the note and invoke this principle to shelter himself under the title of the holder in due course to whom he had transferred it? He certainly cannot. "The owner of the legal estate, subject to a trust or encumbrance, cannot, by a conveyance of the legal estate to a purchaser for value without notice and a re-conveyance to himself, acquire the rights of his predecessor, but is remitted to his original position, and the same principle applies to the transfer of negotiable paper."[46] The clause, as it stands, excepts the case of a holder who is himself a party to the fraud or illegality, but it would not be inconsistent with the requirements of this clause to hold that the party having notice of a fraud or other defect could transfer the paper to a party having no notice, and by a re-transfer to himself, and the application of this principle of sheltering, recover from the acceptor. Mr. Justice Maclaren says that it is only one who has been a party to the fraud or illegality that is precluded from acquiring all the rights of a holder in due course, but we must not imagine that he means that a party in the predicament that we have supposed could recover, although he could not be described as a party to the fraud or illegality.

Presumption of value given.

58. Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value.

Presumption as to holding in due course in favor of holder; but burden shifts on proof of fraud, illegability &c.

(2) Every holder of a bill is prima facie deemed to be a holder in due course; but if, in an action on a bill it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress or force and fear, or illegality, the burden of proof that he is such holder in due course shall be on him, unless and until he proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill by some other holder in due course. 53 V., c. 33, s. 30. [E. s. 30.]

[46] 1 *Ames Cases on B. & N.* 692, note.

Burden of proof as to notice that the consideration was illegal or title defective because of fraud.—Sir William Anson, in his book on Contracts, refers to the position of the transferee who takes an instrument given on an illegal consideration. He says that in the case of a negotiable instrument, consideration is presumed to have been given until the contrary is shown. But suppose it to be shown that the note was given for a gambling debt, or was obtained by fraud, then the position of the transferee is modified to this extent. "As between A. and X." (the payee and the maker,) "the note would be void or voidable, according to the nature of the transaction, but this does not affect the rights of the bona fide holder for value, that is, a person who gave consideration for the note and had no notice of the vitating elements in its origin. The presumptions of law under these circumstances are (1) that he did not give value for the bill, but (2) that he was ignorant of the fraud or illegality; for fraud or participation in an illegal act is never presumed. It will be for D." (the transferee) "to show that he gave value for the bill, but for X." (the maker of the note) "to show that D. knew that the bill was tainted in its origin. If D. proves his point and X. fails to prove his, then D. can recover in spite of the defective title of his assignor."[47] This is scientific and logical, but it is not in accordance with the case of "Tatam v. Haslar."[48] The effect of that case is that when fraud is proved the burden of proof is on the holder to prove both that value has been given and that it has been given in good faith without notice of the fraud. The reasoning is largely dependent on the terms of the Bills of Exchange Act. At the trial, Field, J., instructed the jury, exactly in accordance with the scientific statement of Anson, but without reference to that statement, that the onus was on the plaintiff to satisfy them that he really gave value for the bill, but on the defendant to satisfy them that the plaintiff took the bill under such circumstances as to invalidate his title, because he had, or ought to have had, notice of the fraud. Charles, J., in delivering judgment, concurring in the result with Denman, J., said: "At the time of the passing of the Bills of Exchange Act, 1882, it was uncertain how

[47] *Anson on Contracts*, 10th Ed., p. 26; see also 231.
[48] 23 Q. B. D., 345 (1889).

much the plaintiff had to prove in cases of this kind when evidence of fraud had been giv n. Lord Blackburn, in 'Jones v. Gordon,'[49] says: 'the language of the quotation from Mr. Baron Parke would seem to show that the onus as to both is shifted, but I do not think that has ever been decided, nor do I think it is necessary to decide it in the present case.' The learned judge who tried this case took the view that the onus was shifted only to the extent of making the plaintiff prove that value was in fact given, not that it was given bona fide. Upon the constuction of the act, I respectfully differ from him. The plaintiff was bound to satisfy the jury that he gave value and that he gave it in good faith," that is that he gave it without notice of the fraud, the burden being put upon him of showing absence of notice and not on the defendant, as Anson says, to prove the fact of notice. "The act has settled the law in accordance with the opinion expressed by Parke, B."

Usury no defence without notice.

59. No bill, although given for a usurious consideration or upon a usurious contract, is void in the hands of a holder, unless such holder had at the time of its transfer to him actual knowledge that it was originally given for a usurious consideration, or upon a usurious contract. 53 V., c. 33, s. 30.

No usury law in Canada. Does the section therefore refer to foreign bills void by the "lex loci"?—By section 2 of the Act Respecting Interest, chapter 120, of the Revised Statutes of Canada, 1906, "any person may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount which is agreed upon," except as otherwise provided in said chapter, or in some other act of parliament. The only other provision in the chapter relates to the interest on money secured by mortgage. By the Bank Act—section 91 of chapter 29, R. S. Canada, chartered banks are not allowed to take more than seven per cent., but they do not incur any penalty or forfeiture for usury. It is suggested, therefore, by Mr. Justice Maclaren, that the only

[49] 2 Ap. Ca., 616 at p. 628 (1877).

purpose this section can serve is that of protecting the holder in Canada of a foreign bill which might be void for violation of foreign usury laws.* Mr. Justice Maclaren further notes that it is not merely the holder in due course, or even a holder for value, that is protected; but any holder who had not at the time of the transfer to him of the bill, actual knowledge of the illegality. It may, however, be questioned whether the application suggested by this author will be given to the section. The general principle as to the intrinsic validity of a contract is that it is to be determined by the proper law of the contract, and, in the absence of countervailing considerations, the first presumption is, that prima facie, the proper law of the contract is presumed to be the law of the country where the contract is made."[59] That is to say, if a bill is void because of usurious consideration in the country where it is made, it will, prima facie, be treated as void everywhere else. It may be questioned whether this section is intended to have any effect on the operation of the doctrines of Conflict of Laws, especially seeing that the conflict of laws is expressly dealt with in another part of the act, sections 160 to 164 inclusive. If the validity of the bill, as regards requisites in form is determined by the law of the place of issue, as provided by section 160, one would say that, a fortiori, if the bill in its inception is void for some reason going not merely to the form but to the essence of the transaction, the invalidity would attach to the bill in all countries where the comity of nations is respected. Invalidity arising from failure to comply with the stamp laws of the place where the bill is issued is expressly dealt with in subsection a, of section 160, and cured by that section, the inference from which would be that other cases of invalidity not so dealt with are to be governed by the general rule applicable to such a conflict of laws.

Negotiation.

Statute deals only with transfers according to the law merchant.—As Mr. Justice Maclaren says, the act deals only with the negotiation or transfer of bills ac-

* *Maclaren on B. & N.*, 3rd Ed., p. 193.
[59] See *Dicey on Conflict of Laws*, 569.

cording to the law merchant; that is, by delivery where the bill is payable to bearer and by indorsement ,which includes delivery, where the bill is payable to order. The other methods by which bills may be transferred are left to the operation of the general law. Thus bills, whether negotiable or non-negotiable, may pass by death, by assignment, by levy under execution, by gift "inter vivos," or by "donatio mortis causa," or by any method recognized by the laws of the provinces.

Negotiation means transfer to one who takes as holder.

60. A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.

Bill to bearer negotiated by delivery.

2. A bill payable to bearer is negotiated by delivery

Bill to order requires indorsement.

3. A bill payable to order is negotiated by the endorsement of the holder completed by delivery. 53 V. c. 33, s. 31. [E. s. 31.]

Cross references.—The terms "holder," and "bearer," are defined at pages 10 and 8 (ante) respectively. "Delivery" is defined on page 9 (ante). "Indorsement" is referred to at page 11 (ante). It is discussed more fully in the sections that follow from 62 to 68 inclusive. As to when a bill is payable to order, see page 94 (ante).

Delivery an essential part of indorsement.—The case of "Bromage v. Lloyd,"[51] already referred to, illustrates the necessity for delivery to complete the indorsement.

Transferee for value, has rights of transferror and is entitled to indorsement.

61. Where the holder of a bill payable to his order transfers it for value without endorsing it, the transfer gives the transferee such title as the transferer had in the bill, and the transferee in addition acquires the right to have the endorsement of the transferer.

Transfer without indorsement by payee, who afterwards becomes bankrupt. Who should indorse, Bankrupt or Trustee?—In "Smith v. Pickering,"* a bill was

[51] 1 Exch., 32 (1847). Ante p. 11.
* *Peake*, 50 (1791).

transferred in this way without indorsement. The payees became bankrupt, and, after the bankruptcy, completed the title of the transferee by indorsing the bill. The acceptor defended on the ground that the indorsee had no title. Lord Kenyon, of course, held that the equitable claim was in the plaintiff, and nothing but the beneficial interest of the bankrupts could pass to his trustee. He added that the bankrupts were bound to indorse the bill. Judge Chalmers says that in such a case the proper person to make the indorsement is the trustee in bankruptcy; but he adds that an indorsement by the bankrupt is equally good.[32] In "Watkins v. Maule,"[33] the payee of a note discounted it at a bank, but failed to indorse it, and afterwards became bankrupt and died. His administrator indorsed the note, and it was held a good indorsement. "When a note is handed over for a valuable consideration, the indorsement is mere form. The transfer for consideration is the substance. It creates an equitable right and entitles the party to call for the form." As to the proper person to do this formal act, in a case of bankruptcy, the Master of the Rolls leaves the matter precisely as Chalmers puts it, as one of indifference. "If a note or bill is transferred without indorsement for valuable consideration before the bankruptcy, the holder may afterwards call on the bankrupt or his assignee to indorse it."

The indorsement cannot in such case be made by the transferee himself.—Although the delivery for value confers the beneficial interest on the transferee, this does not enable the transferee himself to do the formal act required to complete the title. In "Harrop v. Fisher,"[34] this was attempted. There the bill was transferred by one Johnstone, the payee, to Ratcliffe, and was presented for payment. The defendant refused to pay it for want of Johnstone's indorsement, and Ratcliffe then wrote an indorsement himself, "per pro," for Johnstone, but it was held that there was no authority for this proceeding. Byles, J., quoted Story for the whole of his opinion, concurring with Erle, J., who said: "We are all of opinion

[32] *See* now 5th Ed. p. 130. The reference is to one of the earlier editions.
[33] 2 Jac. & W., 237 (1820).
[34] 10 C. B. N. S., 196 (1861).

that the defendant is entitled to succeed. The intention was that the property should pass, but the act done is putting an indorsement on the bill, and it carries so many consequences with it to hold that parties may put on what is omitted by inadvertence, that holding that lawful would, I think, be introducing what would be dangerous."

Indorser in representative capacity may negative personal liability.

61. (2) Where any person is under obligation to indorse a bill in a representative capacity, he may endorse the bill in such terms as to negative personal liability. 53 V., c. 33, s. 31. (E. s. 31.)

Person indorsing in representative capacity, should carefully negative personal responsibility.—The comments under section 52 show how easily a party signing in a representative capacity may be trapped into incurring a personal liability. It is always safest to use express words negativing a personal liability, such as "without recourse," or some equivalent words, or words clearly indicating representative capacity and not merely descriptive. See comments under section 52 (ante p. 172.)

Indorsement must be written on bill and signed

62. An endorsement in order to operate as a negotiation,—

(a) must be written on the bill itself and be signed by the endorser;

Must endorse the whole bill.

(b) must be an endorsement of the entire bill.

Indorsement on allonge is good or on copy where copies recognized.

(2) An endorsement written on an allonge, or on a copy of a bill issued or negotiated in a country where copies are recognized, is deemed to be written on the bill itself.

Partial indorsement bad, or transfer to two severally.

3. A partial endorsement, that is to say, an endorsement which purports to transfer to the endorsee a part only of the amount payable, or which purports to transfer the bill to two or more endorsees severally, does not operate as a negotiation of the bill. 53 V., c. 33, s. 32. [E. s. 32.]

Indorsement should be on back. May it be on face of bill?—The indorsement is usually written on the back of the bill, as the word implies, but it was held in "Young v. Glover,"* that it might be written on the face of the bill.

Writing defined.—Writing includes words printed, painted, engraved, lithographed or otherwise traced or copied. It may, therefore, be done by a stamp, and this is not unusual. Section [illegible] provides that where an instrument is required by the Act to be signed, it is sufficient that the signature be written thereon by some other person, by or under the authority of the person whose signature is required.

Indorsement by a stamp.—The Canadian Bankers' Journal discusses the use of rubber stamps for the purpose of indorsing, and the editors say that stamped indorsements, put on with the authority of the party, are quite as binding as written indorsements; and, although from the point of view of the difficulty of proving their genuineness, the practice has some objectionable features, it has become altogether too common and too useful to be now withstood.[ss]

Indorsement distinguished from assignment; also from attempt to make testamentary gift.—The conditions mentioned in the section are expressly stated to be conditions which must be complied with to effect a negotiation of the bill. It does not follow that the bill cannot be assigned without complying with them; but an assignment is not a negotiation of the bill, and hence Mr. Ames says, that "a payee or subsequent party who writes mere words of assignment upon a bill, as, "I hereby assign," or "I have sold this note, &c.," cannot be charged as an indorser. Furthermore, an assignment, not being an indorsement, cannot operate as a transfer according to the law merchant, but will give to one claiming under it as against parties antecedent to the assignor, merely the rights of an assignee of an ordinary

* 3 Jurist N. S., 637 (1857).
ss 3 J. C. B., 111.

"chose in action." As to this point, the American cases are hopelessly conflicting. Mr. Ames disposes of those which are opposed to his dictum by stamping them as "clearly erroneous." The only English case he cites is a "nisi prius" case, which is, therefore, not very authoritative. The indorsement there was as follows: "I hereby assign this draft and all benefit of the money secured thereby to John Granger, &c., and order the within-named, F. F. H., to pay him the amount and all interest." Gurney, B., said: "It is no agreement," meaning presumably, it is not a mere agreement. "It amounts to nothing more than an indorsement of the note, but it is in a very elaborate form."[56] Perhaps it is better for us to consider the question open, although Chalmers closes it on the authority of this case, giving the following illustration: "C., the holder of a bill, assigns it and writers thereon, 'I hereby assign this draft and all benefit of the money secured thereby, to D.' This is an indorsement by C."[57]

Of course it goes without saying that such an agreement, written on a separate paper, would be a mere assignment and not an indorsement of the note. The indorsement must be on the instrument itself or on an allonge. But even if such a writing as Judge Chalmers describes were put on the bill itself, it is not so clear that his statement is correct. The illustration he gives goes further than the case on which he founds it. The case of "Richards v. Frankum"[58] was no exception to the principle that an indorsement must import an order to pay. The writing did, in that case, contain an order, ment written on the bill or note would import such an and Judge Chalmers evidently considers that an assign-order and be an indorsement. Whether he is right or not in pressing the case of "Richards v. Frankum" to that extent, one would not care to say; but whether he is right or not, we must distinguish such cases as the following: "Pay the within to D. or order at my death." This is not an indorsement. It is an attempt to make a testamentary gift. "I hereby guarantee the payment

[56] *Richards* v. *Frankum*, 9 C. & P., 221 (1840).
[57] *Chalmers on Bills.*, 5th Ed., 108, citing *Mitchell* v. *Smith*, 1864, 33 L. J., Ch., 596.
[58] *Richards* v. *Frankum*, 9 C. & P., 221 (1840).

of this note," is, of course, not an indorsement. Mr. Ames says that "such a guarantee is not in any sense negotiable, whether made by the payee or any subsequent party to the bill or note."*

Indorsement for part only is not a negotiation of the bill.—The indorsement, as already stated, must be according to the tenor of the bill. In a very old case in 1698, "Hawkins v. Cardy,"[88] the custom of merchants was declared upon to permit an indorsement for part of the amount for which the bill was made payable, and a bill, so called, was declared on to the order of Blackman for £46 19s., of which he indorsed £43 4s. to the plaintiff. The consequence of this, if permitted, would be to split the original claim against the defendant by giving part to the plaintiff, and leaving part with the original payee. This could not be done, for the reason stated by the court, that "a man cannot apportion such personal contract, for he cannot make a man liable to two actions where, by the contract, he is liable to but one." But the case adds, that "if the plaintiff had acknowledged the receipt of the £3 15s., the declaration had been good. Judge Chalmers may have meant to apply this dictum in the illustration which he gives as follows: "C., the holder of a bill for £100, indorses it, 'pay D., or order, £30.' This is invalid unless C. also acknowledge the receipt of the £70." Is it valid, even if he does acknowledge the receipt, in view of this sub-section which says it must be an indorsement of the entire bill? An indorsement which purports to transfer to the indorsee a part of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill. It would seem to be a fair answer to this question to say that if the holder at the time of indorsing, acknowledges payment of the balance of the amount, for which he is not transferring the bill, he has in fact transferred not a part, but the whole amount payable. But a further question arises: Can the indorsement, which purports to transfer a part only of the amount payable, and which the statute says does not operate as a negotiation of the bill, be made to so

* 1 *Ames Cases on B. & N.*, 225, note.
[88] 1 *Lord Raymond*, 360 (1698).

operate by a subsequent acknowledgment of the transferror, that he has received payment of the balance? Perhaps the same answer as before will suffice, but it is not so clear a case.

Of course, if part of the amount is paid, the payee can then indorse for the balance; but Mr. Byles adds: "If the bill or note be indorsed or delivered for a part of the sum due on it, and the limitation of the transfer do not appear on the instrument, the transferee is entitled to sue the maker or acceptor for the whole amount of the bill, and is a trustee of the surplus for the transferror."[60] Thus in "Reid v. Furnival," where a bill for £300 was sent to the plaintiff to be discounted, and he obtained £100 on it on guaranteeing that amount to the bank, it was contended that he could only recover the £100; but the court said, somebody else may have a demand for £200, but there cannot be two actions on the one note. As soon as the plaintiff recovers the whole amount he becomes trustee for the person entitled to the remainder of the money after deducting the amount that he has advanced.

Signature is sufficient indorsement.

63. The simple signature of the endorser on the bill, without additional words, is a sufficient endorsement. 53 Vic. c. 33, s. 2. [E. s. 32.]

Cross reference.—See remarks under section 67.

All payees must indorse, unless partners or one has authority to indorse for others.

63. (2) Where a bill is payable to the order of two or more payees or endorsees who are not partners, all must endorse, unless the one endorsing has authority to endorse for the others. 53 V., c. 33, s. 32. [E. s. 32.]

Indorsement by one or more of several payees.—In one of the cases before the act, the note was made payable to "Messrs. Watson, Southern and Mayor, or their order, or the major part of them," and Wilde, B., said it was equivalent to "I promise to pay all three or their order, but I allow any two to sign for them all." This

[60] *Byles on Bills*, 16th Ed., p. 202.

would, doubtless, be good since the passing of the act, and was perhaps intended to be covered by the provisions of this sub-section. It is not certain, however, that this is the kind of case referred to in the section. In "Watson v. Evans,"[61] the case just referred to, it was assumed that under the terms of the note the indorsement of a majority of the payees would transfer the title without purporting to be on behalf of the other. In the case of an indorsement made under this section, the one indorsing with the authority of the others would no doubt be intended by the statute to expressly purport to exercise that authority.

In the case of a partnership each partner is presumed to have authority to indorse a bill payable to the order of the firm and in any case where one of several payees or indorsees has authority to indorse, and does so in the name of all, it is in effect the indorsement of all.

Mode of indorsing when name is misspelt.

64. Where, in a bill payable to order, the payee or endorsee is wrongly designated, or his name is misspelt, he may endorse the bill as therein described, adding his proper signature; or he may endorse by his own proper signature. 53 V., c. 33, s. 32. [E. s. 32.]

Indorsement by a person wrongly designated, or whose name is misspelled.—The Imperial Act has the words "if he think fit," after the word "adding," as this act has in the similar provision as to acceptance. Sec. 35 (2). They were in the draft bill in both places, but the Senate struck them out of this sub-section, considering that where the bill was indorsed otherwise than in the correct name of the party, he should add his correct name. The failure to make a corresponding change in the other section was doubtless inadvertent. But it is possible that the effect of the section is not at all different from that of the Imperial Act. Mr. Justice Maclaren says that if the party should indorse the bill by the wrong name or designation alone by which the payee or indorsee is designated, it would no doubt be held to be a valid negotiation of the bill, as he would be presumed to have adopted that as his proper name.*

[61] 1 H. & C., 662 (1863).
* *Maclaren on Bills*, 3rd. Ed , p. 205.

Form of indorsement by married woman.—Judge Chalmers says that a question sometimes arises as to how a bill payable, say to Mrs. John Jones, should be indorsed. The proper form appears to be, "Ellen Jones, wife of John Jones." The form sometimes adopted, "Mrs. John Jones," is clearly irregular, though its invalidity has never been decided.

Person indorsing in representative capacity.—The comments, under section 52, show how necessary it is for a person signing as agent, or in a representative capacity, to guard against incurring a personal liability by the form in which he signs. Unless he wishes to incur such liability he should sign the name of his principal, or the party he represents, and add his own as agent or representative; thus, "A. B., per C. D., agent," or as the case may be.

Indorsements deemed to have been made in apparent order until contrary shown.

65. Where there are two or more endorsements on a bill, each endorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved. 53 V., c. 33, s. 32. [E. s. 32.]

Actual order of indorsements may be proved by parol.—The order in which parties have actually indorsed may be proved by parol evidence. In the absence of such evidence each indorser who is called upon to pay has recourse to the prior indorser, the last of whom has recourse to the drawer, and he to the acceptor, who is the party primarily liable. The cases in which this order of liability and recourse is varied by the agreement of the parties are considered under other sections.

Condition in indorsement may be disregarded by payer.

66. Where a bill purports to be endorsed conditionally, the condition may be disregarded by the payer, and payment to the endorsee is valid, whether the condition has been fulfilled or not. 53 V., c. 33, s. 33. [E. s. 33.]

Conditional indorsements.—The objections to conditional indorsements are well stated by Chalmers in his

first edition. He argues that every indorsement is in the nature of a new drawing, and as a bill could not be drawn conditionally, it should not be indorsed so as to make the payment conditional. A conditional acceptance, it is true, makes the payment conditional, but for that reason it may be treated by the holder as a dishonour of the bill. It would certainly be unjust to the acceptor that he should be held bound to enquire whether the condition had happened which entitled the indorsee to payment. If he refuses to pay, erroneously assuming that the condition has not happened, he dishonours the bill. If he pays, erroneously assuming it has happened, he is liable to pay the money again, as in "Robertson v. Kensington, et al,"[62] where the plaintiff, wishing to purchase a commission as ensign, indorsed a bill to Clerk & Ross, army agents, thus: "Pay the within sum to Messrs. Clerk & Ross, or order, upon my name appearing in the Gazette as ensign in any regiment of the line within two months." The name did not appear, but the acceptors paid the bill to the indorsees, and were held liable to pay it over again to the plaintiff as payee. In this case they could probably have ascertained the facts without trouble, and saved themselves; but cases might well happen where it would not be so simple a matter, and Judge Chalmers doubted whether this case, "which seemed to be the only one in England or America," was sufficient to establish the validity of a conditional indorsement.[63] The Bills of Exchange Act has solved the question by enacting this section. As between the indorser and the indorsee there is no reason why the condition should not be held good, and in such a case as that of "Robertson v. Kensington," for example, where the acceptors paid the money to the army agents, although they had not secured the commission on which the payment to them was made conditional, it would, of course, be right that they, the army agents, should pay back the money which they had wrongfully taken from the acceptor for a consideration which they had never performed. The act says nothing to the contrary of this. It merely relieves the acceptor of responsibility of enquiry into the matter. Where the

[62] 4 *Taunt.*, 30 (1811).
[63] *Chalmers on Bills*, 1st Ed., p. 96.

condition has not been performed it may still be doubted whether the holder under the conditional indorsement could compel the payment, and there seems to be a good deal of force in the argument that the statute does not profess to oblige the acceptor to pay to the conditional indorsee, but rather excuses him if he does pay.

Indorsement in blank or special.

67. An endorsement may be made in blank or special.

Indorsement in bank specifies no indorsee.

(2) An endorsement in blank specifies no endorsee, and a bill so endorsed becomes payable to bearer.

Special indorsement states to whom bill is payable.

(3) A special endorsement specifies the person to whom, or to whose order, the bill is to be payable.

Provisions as to payee apply to special indorsee.

(4) The provisions of this Act relating to a payee apply, with the necessary modifications, to an endorsee under a special endorsement.

Holder may convert blank indorsement into special indorsement to himself or another.

(5) Where a bill has been endorsed in blank, any holder may convert the blank endorsement into a special endorsement by writing above the endorser's signature a direction to pay the bill to or to the order of himself or some other person. 53 V., c. 33, s. 32 and 34. [E. s. 32 and 34.]

Transfer by indorsement. General principles.—The indorsement of a note or bill is the writing of the name of the payee or subsequent holder on the back of the bill, either alone or with other words designated to limit the effect of such a signature, accompanied by delivery of the instrument. The name is usually written on the back of the bill or note, and that is the proper place for it, as the term indorsement implies. But just as we have seen that the acceptance, which is usually written on the face of the bill, may be valid if written on the back, (ante p. 121), so here the indorsement, although usually and properly on the back, has been held to be good although written on the face,[64] where the evidence shewed that the signature was meant to be that of an indorser.

[64] *Young* v. *Glover*, 3 Jur. N. S., 637 (1857).

If a note or bill is payable to bearer it does not require any indorsement to transfer the title and right of action. Delivery alone is sufficient. If it is a negotiable bill and payable to order it requires an indorsement in order to transfer the title.

Indorsement in blank, or general indorsement, distinguished from special indorsement.—The indorsement may be either an indorsement in blank, which was also called a general indorsement, or a special indorsement, otherwise called an indorsement in full. Where an indorsement in blank, or a general indorsement, is made, the payee simply writes his name on the back of the bill and delivers it. Where a special indorsement is made, he writes above his name, "pay to C.," or "pay to C. or order," or any equivalent words, and delivers the bill.

Mr. Ames says that "the signature of the indorser in the case of an indorsement in blank is presumptive evidence of an irrevocable authority to the transferee (or any subsequent holder), to write above the signature an order of payment to himself, or to bearer, or to anyone to whom he may wish in turn to transfer the bill; and the blank indorsement, when so filled up, takes effect by relation from the time of the original delivery by the indorser. A blank indorsement, being incomplete, should be filled up before the instrument is offered in evidence at the trial; but it must be conceded that the courts do not insist upon this, proceeding upon the unfounded assumption that an indorsement in blank is the same thing as an indorsement to bearer."[65] The truth is that this "unfounded assumption" had even long before the Bills of Exchange Act, become too deeply rooted in the law merchant to yield to any technical considerations, if there were any, calling for a different practice from that so universally pursued, and the act expressly recognizes the unfounded assumption in the words of the first sub-section of the section.

Legal effects of indorsement.—Judge Chalmers points out that the indorsement of a bill or note, whether specially or in blank, consists, prima facie, of two distinct

[65] *Ames Cases on Bills*, Vol 2, p. 887.

contracts: (a) the present transfer and negotiation of the bill; (b) the assumption of a future contingent liability on the part of the indorser. "It is important," he says, "to distinguish the two factors in an indorsement, i. e., the transfer and the indorser's contract, for they are often governed by different considerations. The first resembles a contract of sale, the second a contract of guarantee. The first is an executed, the second an executory contract. By the first a 'jus in rem' is transferred. By the second, a 'jus in personam' is created.'"[64] The transaction really admits of a still finer analysis. Judge Chalmers, probably, wishes only to distinguish between the right transferred to the indorsee to receive payment from the maker or acceptor, and the obligation entered into by the indorser to pay the money to the holder if the maker or acceptor should fail to do so. If this is what he has in view, the language is not strictly accurate, for neither of these is a "jus in rem." The only "jus in rem" that is transferred is the right to the document as a document. If we take this into account, there are three distinct legal effects produced by an indorsement: First, the transfer of a "jus in rem," to wit, the property in the note or bill, which may be the subject of an action of trover or replevin; secondly the transfer of a "jus in personam," to wit, the right to recover the amount of the note or bill from the maker or acceptor, which is in effect the assignment of a chose in action; thirdly, the creation of a new "jus in personam," to wit, the right of the indorsee to recover against the indorser in default of payment by the maker or acceptor. It will be noted, however, that the indorsement does not necessarily create this new right, because, as we have seen, it is allowable to the indorser to effect all the other objects for which an indorsement is made without incurring any liability, and there are cases in which, without his intending it, the indorsement produces only the first and second of the effects mentioned without accomplishing the third. The indorser may expressly guard against assuming any liability, or the law may prevent any liability from arising. The first of these cases occurs where the indorsement is made without recourse. For example: If the note is payable to

[64] *Chalmers on Bills*, 5th Ed., p. 61; more fully in 1st Ed., p. 92.

A. B., he may indorse, "Pay to C. D., without recourse to me, (s'g'd) A. B." Or he may indorse thus: "A. B., without recourse"; or "Sans Recours," or any equivalent words. The second case occurs when a bill or note is made to an infant or to a corporation not having capacity to deal in negotiable paper, and therefore not being able to make itself liable on the contract ordinarily implied in an indorsement. Here, although no liability is incurred, the act of indorsing has the effect of transferring the property in the bill. The act provides for both of these cases in the terms of sections 34 and 48.

Application to indorsee of provisions of act regarding payee.—The provisions of the act relating to the payee, which, by this section are, with the necessary modifications, to be applied to the indorsee, are, among others, as pointed out by Judge Chalmers, the sections which require that he must be named or clearly indicated by his office or otherwise, and that the bill may be made payable to two or more jointly, or to one of two or more. Before the passing of the act there was a difference between the effect making a bill payable to a payee named and that of an indorsement to a named indorsee. That is to say, before the act was passed, the effect of the omission of words of negotiation in an indorsement was different from that of the omission in the body of the note. A bill or note payable to A., without further words, could not be negotiated; but where it was negotiable and an indorsement was made in the form, "pay C.," or "pay to C.," without further words, C. could nevertheless indorse it over to another. The bill had begun its course as a negotiable instrument, and therefore when it was transferred by indorsement to C., C. took it with its property of being negotiable. Since the act came into force, as we have seen, a bill payable to A. is payable to him or his order unless made payable to him only. If the bill is negotiable, an indorsement making the bill payable to B. only would be a restrictive indorsement, which is the subject of the next following section.

Restrictive indorsement.

68. An endorsement may also contain terms making it restrictive.

Prohibits further negotiation or confers a mere authority. Illustrations.

(2) An endorsement is restrictive which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof, as, for example, if a bill is endorsed "Pay D. only," or "Pay D. for the account of X.," or "Pay D., or order, for collection."

Rights conferred by such [redacted]

(3) A restrictive endorsement gives the endorsee the right to receive payment of the bill and to sue any party thereto that his endorser could have sued, but gives him no power to transfer his rights as endorsee unless it expressly authorizes him to do so.

Subsequent transferees take subject to terms of indorsement.

(4) Where a restrictive endorsement authorizes further transfer, all subsequent endorsees take the bill with the same rights and subject to the same liabilities as the first endorsee under the restrictive endorsement. 53 V., c. 33, ss. 32 and 35. [E. ss. 32 and 35.]

Restrictive indorsement, distinguished from mere statement of value furnished by some other party, &c.—Examples of restrictive indorsements are given in the act, and the effect of such indorsement is clearly stated; but an illustration from an actual case will help to shew the importance of the principle. In "Truettell v. Barandon,"[67] the bills were indorsed, "Pay to J. P. DeRoure or order, for account of Truettell & Wurtz." DeRoure deposited these bills with his bankers for advances present and future, but the indorsement being restrictive was notice to the bankers that DeRoure did not hold the bills for himself, but for Truetell & Wurtz, and they therefore took them at the risk of Truetell & Wurtz demanding the money; and not only so, but it was held in this case that they could sustain trover against the banker for the bills themselves. The act provides that an indorsement is restrictive which prohibits the further

[67] 8 *Taunt.*, 100 (1817).

negotiation of the bill ,or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof; as for example: if a bill is indorsed, "Pay D. only," or "Pay D. for the account of X.," or "Pay D. or order for collection." The act does not proceed to explain, as Chalmers did in his first edition, that the mere statement in the indorsement that the value has been furnished by some person other than the indorsee does not make it restrictive;[68] for example, "Pay J. Spittall, Esq., or order, value in account with H. Drinkwater," but this distinction is, no doubt, still valid. As to such an indorsement, it was said: "Value in account means only value received in account, and is of the same effect in an indorsement as on the face of the bill. It expresses that value has been received, and received in a certain manner; but it in no way restricts the effect of the indorsement."[69]

Negotiable bill continues so until.

69. Where a bill is negotiable in its origin, it continues to be negotiable until it has been,—

Restrictively indorsed.

(a) restrictively endorsed; or

Or discharged.

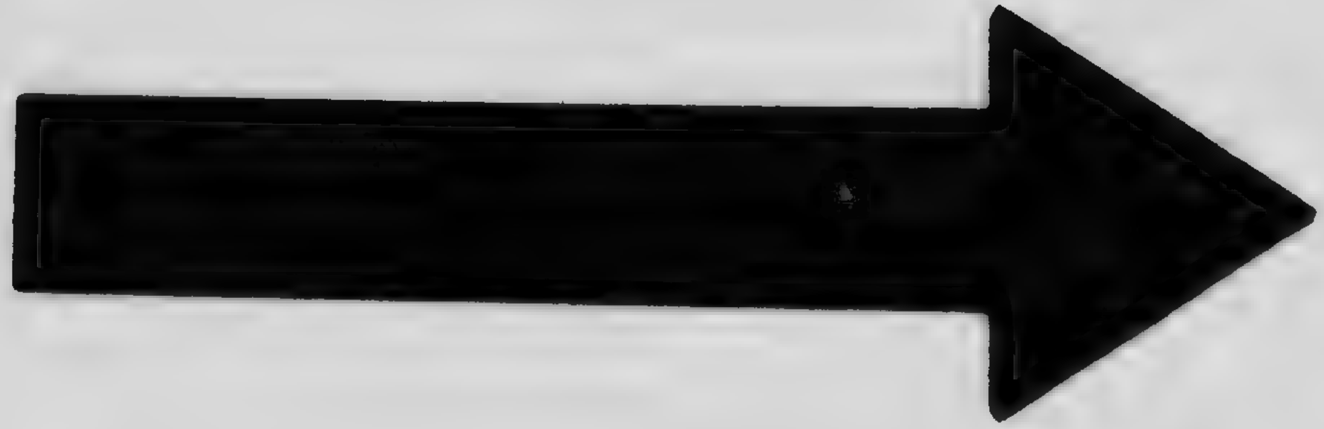
(b) discharged by payment or otherwise 53 V., c. 33, s. 36. [E. s. 36.]

Overdue bill can be negotiable only subject to defects of title.

70. Where an overdue bill is negotiated, it can be negotiated only subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which had the person from whom he took it. 53 V., c. 38, s. 36. [E. s. 36.]

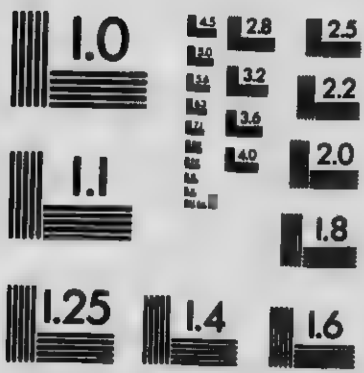
Bill being overdue is equivalent to notice of defects in title.—We have seen (ante p. 205) that a purchaser for value, without notice, before maturity, who, in our act, is called a holder in due course, takes the title to a negotiable instrument freed from equities to which it was subject in the hands of the transferror, and free also from

[68] *Chalmers on Bills*, 1st Ed , p. 99.
[69] *Buckley* v. *Jackson*, L. R., 3 Ex., 136 (1868).



MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



a number of legal defences to which the bill in the hands of the transferror might be subject. He takes a better title than his transferror, who, were he suing on the bill, might be exposed to any legal or equitable defences that the acceptor could establish. When the transfer takes place after maturity of the bill, or after it has been dishonoured by non-acceptance with notice of that fact to the transferee, the position is altogether different.. The fact that the bill is overdue is equivalent to notice of any defect which could, with notice, constitute a defence to a holder who took the bill before maturity. Speaking broadly, the holder who takes after maturity, with or without notice, is on the same footing with the holder who takes before maturity with notice that the bill has been dishonoured, or with notice of facts constituting defences to the bill. He takes subject to defences. The holder who takes before maturity and without such notice, takes free of defences. But it is necessary at this point to make a distinction. There is one class of defences which the acceptor or maker cannot set up against an innocent holder for value before maturity, although he could have set them up had the original payee been suing, or one who, by virtue of notice and knowledge, was in the same position as the payee. There is another class of defences which can be set up, no matter in whose hands the bill happens to be, whether it has been transferred before or after maturity, for value or without value, or with or without notice. Mr. Ames calls these real defences, because "like real actions, they are founded upon a right good against the world. They are called real because they attach to the "res," i. e., the instrument itself, regardless of the merits or demerits of the plaintiff. A purchaser for value is, therefore, powerless against a real defence."[70]

Real defences are based, says Mr. Ames, upon (a) the incapacity of the defendant to make a binding contract; (b) illegality, where by the form of statute certain contracts are declared to be absolutely void; (c) the extinguishment of the instrument by cancellation, alteration or release by deed, executed by the holder after maturity.

[70] *Ames Cases on B. & N.*, Vol. 2, p 811.

Demand bill deemed overdue when it appears to have been in circulation unreasonable time, which is a question of fact.

70. (2) A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time.

(3) What is an unreasonable length of time for such purpose is a question of fact. 53 V., c. 33, s. 36. [E. s. 36.]

When is a bill overdue, for the purpose of affecting a holder with equities?—The enquiry, when is a bill overdue, may have reference to the question when notice of dishonour should be given or when an action can be brought, or when the bill or note is overdue so as to affect the subsequent holder with notice of equities. We shall deal with the last enquiry at present. The statute itself has answered the question in this aspect of it with regard to bills payable on demand and has made a very clear and important distinction in this respect between bills and notes. The sub-section above set out provides that, "a bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section," (that is so that subsequent transferees take it subject to equities) "when it appears on the face of it to have been in circulation for an unreasonable length of time; what is an unreasonable length of time is a question of fact."[71]

"A cheque is a bill of exchange drawn on a bank payable on demand,"[72] and except as otherwise provided in the part of the act relating to cheques, the provisions of the act applicable to a bill of exchange payable on demand apply to a cheque.[73] In "The London and County Bank v. Groome,"[74] decided the year before the act was passed, a cheque was taken eight days after its date by the plaintiff. The transferror had been guilty of fraud and would not have been able to recover from the drawer, and the question was whether the transferee took subject to this defence. It was held that he did not, but that it was a question for the jury whether the cheque was taken under circumstances that ought to have

[71] Section 70.
[72] Section 165.
[73] Section 165.
[74] 8 Q. B. D., 288 (1881).

excited suspicion. This case will be referred to at greater length under the sections relating to cheques. See section 166.

Difference as to this point between demand notes and bills of exchange.—The law with reference to notes of hand payable on demand is not precisely the same as that with reference to a bill, and the reason for the difference seems to be that a note of hand made payable on demand is regarded as a "continuing security."[75] In other words, when a bill is drawn payable on demand, it is intended that it should be paid within a reasonable time after demand, and if it is not so paid that very circumstance should put the party who receives it upon his guard; but when a note is made payable on demand, it is not ordinarily expected that it should be at once demanded and paid. It is more commonly the case that the money is to be considered as in the maker's hands on call. It need not excite suspicion that the money has not been paid, for it may never have been called for. The act, therefore, following this rationale declares that "where a note payable on demand is negotiated it is not deemed to be overdue for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presentment of it for payment has elapsed since its issue."[76]

Mr. Ames makes a distinction between a note which, by its terms is payable on demand, and one in which no time is mentioned, saying,[77] that a note containing no time of payment, being regarded as immediately due, cannot be transferred so as to give the transferee a greater interest than the payee himself, for which he cites an American case and follows it with another contra. The reason for this distinction is not obvious, and probably the matter would be considered as settled for us by our act. A note in which no time is mentioned is a note payable on demand, and the statute gives us the law as to a note payable on demand, which would probably be held equally applicable to one made so in express

[75] *Cf Lefliey* v. *Mills*, 4 T. R., 170; with *Brooks* v. *Mitchell*, 9 M. & W., 15.
[76] Section 182.
[77] 1 *Ames*, p. 783, note.

terms and one held to be so by the application of legal principles of construction to its express terms.

Notes and bills other than on demand.—As to notes and bills other than those payable on demand, Chalmers answer to the question is a very simple one, but he does not refine very nicely as to the different cases. He says: "A bill payable otherwise than on demand is overdue after the expiration of the last day of grace."* Mr. Ames' statement is more exact. He says: "Paper payable at a fixed date is not overdue until after the presentment on the last day of grace."† Both authorities agree that the paper is overdue on the expiration of the last day of grace, but Mr. Ames' statement goes further and applies to the case of paper presented on that day and dishonoured. It would seem from Ames' statement that if a bill were presented on the last day of grace and payment were refused, the purchaser would take subject to equities; but it is very doubtful if this would be the case, unless notice of the dishonour were brought home to him. There is no English decision on this point. In support of Mr. Ames' view it might be urged that the purchaser of paper on the last day of grace might reasonably be held to take it at his peril, knowing that it could have been presented and demanded on that day. But on the other hand, the maker or acceptor has all that day to pay the amount. He cannot be sued until the day has expired, and although the circumstance that it has not been paid, and that it is being offered for sale or discount may raise suspicion, yet we have learned that su[illegible]cion is not enough to disentitle a bona fide holder. "[illegible] ave shaken off the last vestige of the contrary doc[illegible]e."‡ Actual notice alone will disentitle the bona fide holder. If the note is overdue, the holder is in the same position as if he had actual notice, but that is the very question we are asking, whether the note or bill is overdue, and we must not mix up the two things. It is either overdue or it is not overdue.

When is a note payable by instalments overdue so as to subject transferee to defences?—It has already been

* *Chalmers on Bills*, 6th Ed., 120.
† *Ames Cases on B. & N.*, Vol. 2., p. 854.
‡ See page 207 (ante.)

said that Judge Chalmers does not refine as carefully as Mr. Ames. For instance, as to a note payable by instalments, Chalmers does not tell us whether a note payable by instalments is overdue so as to affect a subsequent holder with equities if one instalment is overdue and unpaid. Probably there is no English case on the question. There is none in Mr. Ames' collection. We have already seen that such a note is good and that it is none the less good if containing a provision that on non-payment of one instalment the whole shall become due. In "Vinton v. King," in Massachusetts,* a suit was brought on a mortgage given to secure a note payable by instalments. The note was indorsed to the plaintiff after the first instalment was due and unpaid and the mortgage was also assigned. It was held that the defendant could make the same defence to the mortgage as to the note, that it was given to secure, and therefore, the court must enquire whether the plaintiff took subject to equities the note which it was alleged had been obtained by duress and fraud, the contention being of course, that the plaintiff did not take it subject to equities, as the note was not overdue. Metcalf, J., said: "The ground assumed by the plaintiff is that in this case the note had not, within the rule of law on this subject, come to maturity, and was not overdue and dishonoured before it was transferred to him, because the time for payment of the last three instalments had not then come. This ground is not maintainable. As to the first instalment of \$53.00 in six months and interest on \$212, the note had come to maturity and was overdue and dishonoured when the plaintiff took it; and as to the amount of that instalment it is not to be doubted that the defendant may have the same defence against the plaintiff which he might have made against the payee, and we are of opinion that he may make the same defence to the whole note. The note is a simple contract to pay \$212 in four half-yearly instalments, and the plaintiff took it with notice on its face that as to the first instalment the defendant might have justifiable cause for withholding payment, whatever that cause might be," &c. It is not suggested that in order to subject the holder to equities he must have

* 4 *Allen*, 562 (1862).

notice that the instalment has not been paid, and Mr. Daniel, on the authority of this case, lays down the proposition without any such qualification, that "if a note be payable by instalments it is dishonored when the first instalment becomes overdue and unpaid, and he who takes it afterwards takes it subject to all equities between the original parties."*

Does the fact that interest is overdue and unpaid subject transferee to defences?—Suppose the interest be made payable before the maturity of the note and remain unpaid when due. On a note payable at a twelve month with interest, payable half-yearly, does the non-payment of the half year's interest affect a subsequent holder with equities? Mr. Daniel says this is a controverted point, but the weight of authority is in favor of the view that this would not be an overdue note. It is difficult to see any reason for this opinion, and equally so to distinguish between the non-payment of interest and the non-payment of an instalment of the principal. In both cases the maker is in default, and there are no inferences that a subsequent holder should draw from the non-payment of an instalment of the principal which could not be as fairly drawn from a default in payment of the interest. Mr. Ames says, however, after telling us that it has been held that a default in payment of the interest due upon a note places the note upon a footing with overdue paper (a), that "a default in payment of interest due before maturity of the note does not work a dishonour of the note."† The latter quotation must be taken as a statement of his own opinion upon the question, but, in the absence of English authority, and in face of the conflict of American authorities, it cannot be accepted as closing the question.

Negotiation presumed to be before maturity unless endorsement dated later.

71. Except where an endorsement bears date after the maturity of the bill, every negotiation is "prima facie" deemed to have been effected before the bill was overdue. 53 V., c. 33, s. 36. [E. s. 36.]

* *Daniel on Neg. Inst.*, 5th Ed., p. 781.
† *Ames Cases on B. & N.*, Vol. 2, p. 855.

Transferee before maturity with notice of the dishonor of bill takes it subject to defects.

72. **Where a bill which is not overdue has been dishonoured, any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour; but nothing in this section shall affect the rights of a holder in due course. 53 V., c. 33, s. 36. [E. s. 36.]**

Question set at rest by this section.—This section sets at rest the question on which the authorities before the act passed were in conflict. The earlier decisions in "Crossley v. Hamm" and "O'Keefe v. Dunn," are followed in preference to the rule adopted in "Goodman v. Harvey."*

Endorser or acceptor, to whom bill negotiated back may re-issue bill, but not enforce against intervening party to whom he was previously liable.

73. **Where a bill is negotiated back to the drawer, or to a prior endorser, or to the acceptor, such party may, subject to the provisions of this Act, re-issue and further negotiate the bill, but he is not entitled to enforce the payment of the bill against any intervening party to whom he was previously liable. 53 V., c. 33, s. 37. [E. s. 36.]**

Negotiation of bill back to prior party; such party may re-issue bill.—This section is to be read as subject to the other provisions of the act. Among these provisions are those of sections 139 to 141. By the latter section it is provided that where the acceptor of a bill becomes the holder of it at or after maturity, in his own right, the bill is discharged. After its discharge it cannot, of course, be re-issued. It is no longer a negotiable instrument. To use the term adopted by Mr. Ames, it is extinguished. The section must, therefore, so far as it respects negotiation to the acceptor, apply to a negotiation of the bill before maturity, or, if at maturity, then a negotiation to the acceptor otherwise than in his own right. Section 139 provides that the bill is discharged when it is an accommodation bill and has been paid in due course, that is at maturity, by the party accommodated. This may be the drawer or an indorser. A

* See ante p. 209.

negotiation to such a party paying the bill at or after maturity also extinguishes it, and it cannot therefore be re-issued. So also when a bill payable to or to the order of a third party is paid by the drawer, section 140 provides that while the drawer may enforce payment thereof against the acceptor he may not re-issue the bill; and a payment in due course by, or on behalf of the drawee or acceptor, discharges the bill. These subjects are dealt with under sections 139 to 141, which relate to the discharge of the bill.

Party so taking bill cannot enforce it against parties to whom he was liable.—The subjects here dealt with cannot be exhaustively discussed at this place. They will be dealt with under sections 139 to 141, which deal with the subject of discharge of the bill by payment or by a negotiation back to the party primarily liable on the bill. The gist of this section seems to be, not so much to declare the rights of the parties referred to in respect to the negotiation of the bill, as to express the principle that one who is already a party to the bill, and into whose hands it comes again by a subsequent negotiation, cannot have recourse against any of the intervening parties who, if they had been called upon to pay the bill, would have had recourse against him. Thus, when A. is an endorser on a bill which has afterwards been indorsed by B., C. and D. by successive transfers, and it comes back into the hands of A., if A. were allowed to recover against B., C. or D. as a prior indorser, the party who had been compelled to pay A. as holder, would have been entitled to have recourse against him as being a prior indorser and therefore liable to him. To prevent this circuity of action, the principle of this section was well settled long before the act was passed, that A. could not maintain an action against any of the parties to whom he would in turn have been liable as a prior indorser.

Right of holder to sue on bill.

74. The rights and powers of the holder of a bill are as follows:—

(a) He may sue on the bill in his own name. 53 V., c. 33, s. 38. [E. s. 37.]

The holder, as defined, is not the only person who can sue on the bill in his own name.—The term, holder, has

been defined at p. 10. That definition cannot, however, be made to cover all the cases in which the plaintiff can sue on a bill in his own name. The executor or administrator of a deceased holder or the assignee or trustee in bankruptcy, can sue on the bill. Perhaps we should say that these parties do not sue in their own name, but merely in a representative capacity. Certainly the executor or administrator can sue although he may not be the payee or indorsee in possession of the bill, or the person in possession of a bill or note expressed to be payable to bearer, or on which the only or the last indorsement is an indorsement in blank. This is the definition of holder as arrived at by the expansion of the terms used in the concise definition contained in section 2 (g). The bill or note may have a special indorsement making it payable to the deceased and thus excluding the definition. So, also, with the case of the assignee in bankruptcy. Unless we choose to say that in both these cases the plaintiff sues not in his own name because he is suing in a representative capacity, we shall have to say that this section does not state the only case in which a party can sue in his own name on the bill.

Mere authority to sue on the bill does not make plaintiff the holder; contrasted cases.—It is more important, however, to distinguish the cases in which a party is not allowed to sue on a bill because he does not fulfil the conditions of being a holder. For this purpose it may be well to contrast the case of "Emmett v. Tottenham,"[78] with "Law v. Parnell."[79] In the former case the executor of the deceased holder of the bill was desirous of not appearing on the record, and applied to a prior party who had indorsed the bill in blank and delivered it to the deceased. The party so applied to induced the plaintiff to bring the action and procured the bill for the purpose of making a copy, but returned it to the executor, who retained it in his possession, or that of this agent, until after action was brought, when it was given to the plaintiff. The court held, Pollock, C. B., delivering the judgment, that the case fell within the simple proposition

[78] 8 Exch., 884 (1853).
[79] 7 C. B. N. S., 282 (1859).

that a person who has no interest in or possession of a bill of exchange cannot maintain an action on the instrument. It was suggested that the plaintiff had possession through his agent, but the court held that the relations were the reverse of this, that the plaintiff was in truth the agent of the executor. In Law v. Parnell," the plaintiff was the manager and shareholder in an association which carried on the business of a deposit and discount bank, and the bill in question had been indorsed in blank and handed to them to cover advances. It was the duty of the plaintiff to hold bills and other securities on behalf of the bank and he brought the action on this bill by authority of the directors. The point was taken that he alone had no right to sue, but all the shareholders should have joined in the action. But the court held that he had the right to sue alone. "It is plain," said Williams, J., "that the bill was indorsed by a person who intended to pass the property therein from himself to the bank; and that the property accordingly vested in them. Then the bank, being the holders of the bill indorsed to them in blank, might lawfully constitute any third person the holder for the purpose of suing upon it, and the evidence showed that they did authorize the present plaintiff, their manager, to sue on it in their behalf."

Holder in due course holds free from personal defences.

74. **(b) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences, available to prior parties among themselves, and may enforce payment against all parties liable on the bill;**

If title is defective his transferee in due course obtains good title.

(c) Where his title is defective, if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill; and

Payment in due course to person with defective title.

(d) Where his title is defective if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill. 53 V., c. 33, s. 38. [E. s. 37.]

Characteristic of negotiable instruments.—It is in these sub-sections that the statute sets forth the cardinal prin-

ciple of the law with respect to negotiable instruments, the essential element that distinguishes them from all other kinds of property and constitutes them a class by themselves.

Negotiation distinguished from assignment of choses in action and sales of chattels.—The rights conferred and obligations imposed by the transfer of negotiable paper are peculiar to this species of security. They result from, or perhaps it should be said they constitute the negotiable quality of such instruments. Analogies drawn from the transfer of ordinary chattels, or even from the transfer of ordinary choses in action would be misleading. In the case of an ordinary chose in action, in jurisdictions in which the most perfect freedom of assignment is allowed, the transferee can ordinarily get no better right or title than that of the person from whom he has acquired it. If the transferror had no title the transferee can acquire none, and if, in the hands of the assignor the chose in action was subject to any equitable defence, the assignee takes the right burdened with that defence. In short, the transferee must stand in the shoes of the transferror. Now, this is not at all the position of the transferee of a negotiable instrument. Again, the person who is merely in possession of personal property without having any title to it can, as a rule, convey no title to another. It makes no difference whether the party claiming under such a conveyance has given value or not, or whether or not he has purchased without notice of any flaw in the title of his transferror. The maxim is radical and almost universal which Mr. Benjamin places in the fore-front of his discussion of the sale of personal property, "memo dat quod non habet." With the exception of sales in market overt, and of the statutory exceptions made by the Factors' acts in favor of purchasers and pledgees of merchandise from factors, brokers and agents, the rule is as stated with reference to all ordinary chattels.

A large exception, however, has to be made in favor of the current coin of the realm, as to which it is trite learning that it passes from hand to hand without any enquiry as to title, and nobody would ever think of asking whether the party tendering of paying it had come by

it honestly or otherwise. Indeed, it would obviously paralyze commerce and render mercantile transactions in many cases impossible, if the recipient of money were put upon enquiry as to the title of the party tendering or paying it, and it is clear law that no defect of title in the payer can prejudice the title of the payee who takes the money in good faith and without knowledge of such defect. Now, it is the distinguishing mark of negotiable paper—it is a part of its negotiable quality—that in this respect it is placed on the same footing as money. The person who takes it is not bound to ask any questions as to the title of the person from whom it is taken. He gets a good title no matter what may be the defects in the title of the person who transfers it.

Stated, however, in this broad form, our proposition must be understood as limited to the case of negotiable paper which has been made payable to bearer, or in other words, has become transferable by delivery; and furthermore, that we are now discussing and confining ourselves to the consideration of transfers before maturity. Where the transfer takes place after maturity a different principle applies, which has already been the subject of discussion. The principle now under consideration then is, as respects a negotiable instrument transferable by delivery and which has been transferred before maturity, that, "the purchaser for value without notice, from the party in possession, acquires a title irrespective of the title of his vendor." In an old and leading case of "Miller v. Race,"* 1758, the facts were that W. Finney had sent a bank-note by mail to his correspondent. The mail was robbed and this note, among others, was taken. It came into the hands of the plaintiff for a full and valuable consideration in the usual course and way of business, and without any notice or knowledge of this bank-note having been taken out of the mail. The plaintiff applied to the bank for payment of the note and delivered it to the defendant, a clerk in the bank, who refused either to pay the note or deliver it back to the plaintiff. An action of trover was brought and the plaintiff recovered a verdict subject to the decision of the court, "whether under the circumstances of this case the plaintiff had a sufficient

* 1 *Burr.*, 452.

property in this bank-note to entitle him to recover in the present action?" He was obliged to make his title through a thief; he could not recover ordinary property on such a title as that. It was argued accordingly, for the defendant, that "the plaintiff can have no right by the assignment of a robber." It may seem almost superflous to quote the judgment of Lord Mansfield, but he states the principle under consideration with such fulness and accuracy that it will probably save a great deal of trouble later on, when we will have to deal with more complex cases and various limitations and qualifications of the general principle, to have put before us a clear and definite statement of the doctrine at first hand. Lord Mansfield, in delivering the judgment, said: It has been very ingeniously argued by Sir Richard Lloyd for the defendant. But the whole fallacy of the argument turns upon comparing bank-notes with what they do not resemble, and what they ought not to be compared to, namely, to goods or to securities or documents for debts. Now, they are not goods or securities nor documents for debt, nor are so esteemed; but are treated as money, as cash, in the ordinary course of the transaction of business by the general consent of mankind which gives them the credit and currency of money to all intents and purposes. They are as much money as guineas themselves are, or any other current coin that is used in common payments as money or cash. They pass by a will which bequeaths all the testator's money or cash; and they are never considered as securities for money, but as money itself. Upon Lord Ailesbury's will, £900, in bank-notes, was considered as cash. On payment of them, whenever a receipt is required, the receipts are always given as for money, not as for securities or notes. So on bankruptcies they cannot be followed as identical or distinguishable from money, but are always considered as money or cash. 'Tis pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench and mistake their meaning. It has been quaintly said, 'that the reason why money cannot be followed is because it has no earmarks,' but this is not true. The true reason is upon account of the currency of it; it cannot be recovered after it has passed into currency. So in case of money stolen, the true owner cannot recover it

after it has been paid away fairly and honestly upon a valuable and bona fide consideration; but before money has passed into currency an action may be brought for the money itself. There was a case in the 1 G. I. at the sittings, "Thomas v. Whip," before Lord Macclesfield, which was an action upon assumpsit by an administrator against the defendant for money had and received to his use. The defendant was nurse to the intestate during his sickness, and being alone, conveyed away the money. Lord Macclesfield held that the action lay. Now, this must be esteemed a finding at least. Apply this to the case of a bank-note. An action may lie against the finder, it is true, (and it is not at all denied), but not after it has been paid away in currency. And this point has been determined even in the infancy of bank-notes, for 1 Salk. 126, M. 10, W. 3, at "Nisi Prius," is in point. And Lord Ch. J. Holt, there, says that it is, 'by reason of the course of trade which creates a property in the assignee or bearer.' (And, 'the bearer' is a more proper expression than assignee.) Here an inn-keeper took it bona fide in his business from a person who made the appearance of a gentleman. Here is no pretence or suspicion of collusion with the robber, for this matter was strictly examined and enquired into in the trial, and is so stated in the case, 'that he took it for a full and valuable consideration in the usual course of business.' Indeed, if there had been any collusion or any circumstances of unfair dealing, the case had been much otherwise. If it had been a note for £1,000, it might have been suspicious; but this was a small note for £21 10s. only, and money given in exchange for it.[80] Another case cited was a lost note in 1 Ld. Raym. 738, ruled by Ld. Ch. J. Holt, at Guildhall in 1698, which proves nothing for the defendant's side of the question; but is exactly agreeable to what is laid down by my Lord Ch. J. Holt in the case I have just mentioned. The action did not lie against the assignee of the bank bill, because he had it for valuable consideration. In that case he had it from the person who found it, but the action did not lie against him because he took it in the course of currency, and therefore it could not be followed in his hands. It never

[80] See as to this suggestion ante p. 206.

shall be followed into the hands of a person who bona fide took it in the course of currency and in the way of his business. The case of " Ford v. Hopkins " was also cited, which was an action of trover for million lottery tickets, but this must be a very incorrect report of the case. It is impossible that it can be a true representation of what Lord Ch. J. Holt said. It represents him as speaking of bank notes, exchequer notes and million lottery tickets as like to each other. Now, no two things can be more unlike each other than a bank note and a lottery ticket. Lottery tickets are identical and specific; specific actions lie for them. They may prove extremely unequal in value. One may be a prize, another a blank. Land is not more specific than lottery tickets are. It is there said 'that the delivery of the plaintiff's tickets to the defendant as that case was, was no change of property.' And most clearly it was no change of property; so far as the case is right. But it is here urged as a proof, 'that the true owner may follow a stolen bank note into what hands soever it shall come.' Now, the whole of that case turns upon the throwing in bank notes as being like lottery tickets. But Lord Ch. J. Holt could never say 'that an action would lie against a person who, for a valuable consideration, had received a bank note which had been stolen or lost and bona fide paid to him,' even though the action was brought by the true owner; because he had determined otherwise but two years before, and because bank notes are not like lottery tickets, but money. The person who took down this case certainly misunderstood Lord Ch. J. Holt, or mistook his reasons. For this reasoning would prove, (if it was true as the reporter represents it), that if a man paid to a goldsmith five hundred pounds in bank notes, the goldsmith could never pay them away. A bank note is constantly and universally, both at home and abroad, treated as money, as cash, and paid and received as cash; and it is necessary for the purposes of commerce that their currency should be established and secured. There was a case in the Court of Chancery on some of Mr. Child's notes, payable to the person to whom they were given, or bearer. The notes had been lost or destroyed many years. Mr. Child was ready to pay them to the widow and administratrix of the person to

whom they were made payable, upon her giving bond with two responsible securities, (as is the custom in such cases), to indemnify him against the bearer, if the notes should ever be demanded. The administratrix brought a bill which was dismissed because she either would not or could not give the security required. No dispute ought to be made with the bearer of a cash note, in regard to commerce and for the sake of the credit of these notes, though it may be most reasonable and customary to stay the payment till enquiry be made whether the bearer came by the note fairly or not."

The defects of title in the prior party free from which it is here said that the holder in due course holds the bill, are of the kind enumerated in section 56 (2), for example that the bill or acceptance of the bill was obtained by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or that it has been negotiated in breach of faith or under circumstances which amount to fraud. These are all in the nature of personal defences, the benefit of which will be lost if the holder is a holder with notice, or if he has obtained the bill after it is overdue, which has the same effect upon the holder's title as if he had actual notice of the defects. This section does not prevent the defendant from setting up any facts which constitute a real defence, such as the incapacity of the defendant to make a note or accept a bill of exchange, illegality of the consideration in the rare if not obsolete cases, where that has been by statute made to avoid the security altogether even in the hands of an innocent indorsee, the extinguishment of the instrument by cancellation, material alteration, or payment at maturity, or release by deed executed by the holder after maturity. Even a holder in due course is likely to be met by defences such as these, because, as quoted from Ames on a previous page, (2 Ames cases 811), they attach to the "res" and are not merely personal defences.

The last sub-section is a mere corollary from the preceding one. If the holder with a defective title transfers to a holder in due course, the latter "ipso facto," comes under the protection of the preceding section, nay, becomes by that transfer a holder in due course. If the holder with the defective title does not transfer but

obtains payment of the bill from the party liable upon it that is any party so liable, whether primarily or as surety, the party so paying in due course gets a valid discharge from his liability.

PRESENTMENT FOR ACCEPTANCE.

Presentment of sight bill for acceptance necessary.

75. Where a bill is payable at sight or after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument.

So where presentment stipulated for or where bill payable elsewhere than at drawee's residence or place of business.

(2) Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment.

Not necessary in other cases.

(3) In no other case is presentment for acceptance necessary in order to render liable any party to the bill. 53 V., c. 33, s. 39. [E. s. 39.]

What date should acceptance bear?—Where a draft is payable at sight or at a definite time after sight the acceptance should be dated in order to fix the maturity of the bill. What date it should bear was not determined by the original act. By section 42,* two days after presentment were inferentially given to the drawer to accept the bill, and the question arose whether when he availed himself of this delay he should date the bill as on the day of its first presentment to him to him as was required by section 18 (2),* in the case of a bill payable at or after sight which has been dishonored by non-acceptance and afterwards accepted, or whether he was at liberty to date his acceptance on the day on which it was delivered. If the former were the true construction, the further question arose whether an acceptance not being dated on the day of presentment would be a qualified acceptance which would discharge the drawer and indorsers unless assented to. For the purpose of setting these questions at rest an amendment to the act was passed in 1902 which is now section 80 of the act. See particularly subsections 4 and 5, and remarks at page 126 (ante.)

* As formerly numbered. See now Sec. 80 and Sec. 37 (2).

The rules for making presentment for acceptance are set out with minuteness in section 78.

What bills must be presented for acceptance?—According to this section there are only certain cases in which it is necessary to present a bill for acceptance before presenting for payment.

A bill payable at sight or after sight must be presented to fix the maturity of the instrument.

Where a bill expressly stipulates that it shall be presented it must be presented for acceptance before it is presented for payment.

Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it is presented for payment. But the compliance with this requirement might in some cases be impossible or not feasible with the exercise of reasonable diligence, and hence the following section (76) has been passed to provide for such cases.

Where time not sufficient to present for acceptance before presenting for payment delay is excused.

76. Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers. 53 V., c. 33, s. 39. [E. s. 39.]

Purpose of this section.—The requirement of subsection 2 of the preceding section is such that it might not be possible with the exercise of reasonable diligence to present the bill for acceptance before it must be presented payment. In such cases the presentment for acceptance is exercised.

What is reasonable diligence?—In determining whether the bill could have been presented for acceptance with the exercise of reasonable diligence, before presentment for payment, the facts of the particular case must be taken into account. See comment under section 89 as to reasonable diligence.

Bill at or after sight must be presented or negotiated in reasonable time.

77. Subject to the provisions of this Act, when a bill payable at sight or after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time.

Otherwise drawer and prior endorsers discharged

(2) If he does not do so, the drawer and all endorsers prior to that holder are discharged.

Reasonable time determined by nature of bill, usage of trade and facts of case.

(3) In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case. 53 V., c. 33, s. 40; 54-55 V., c. 17, s. 5. [E. s. 40.]

Sight drafts not included in Imperial Act.—As already explained, the Imperial Act treats a sight draft as payable on demand, and therefore not calling for presentment for acceptance. By the amending act of 1891, sight drafts in Canada have been included among those on which days of grace are allowed and they must be presented for acceptance in order to determine the date from which the days of grace are to run. See comment page 262, as to the time allowed for acceptance.

Reasonable time is a question for the jury subject to review by court.—Both Chalmers and Maclaren say that the question of reasonable time is a mixed question of law and fact, and cite authorities of which there is an abundance in support of the statement.[31] But it is difficult to assign any precise meaning to this mere combination of words. "All questions of fact for a jury or for a court are mixed questions of law and fact; for they must be decided with reference to all relevant rules of law; and whether there be any such rule and what it is, must be determined by the court. Now, since this mixture of law and fact is thus common to a variety of different situations, it is an uninstructive circumstance to lean upon when one seeks for guidance in discriminating these situations."[32] "Where the courts or statutes have fixed the legal standard of reasonable conduct, e. g.,

[31] *Chalmers on Bills*, 6th Ed., 137; *Maclaren on Bills*, 3rd Ed., 232.
[32] *Thayers Preliminary Treatise on Evidence*, 224-5.

as being that of a prudent man, and have no exacter rule, the determination of whether any given behaviour conforms to it or not is a mere question of fact. It is not a question of law, because there is no rule in question. * * * It seems, therefore, to be true * * * that questions of reasonable conduct, while requiring a 'judgment' of the evidence and the application of the rule of law to the facts, submit none the less to classification as questions of fact—sometimes fact for the court, but generally fact for the jury."[83] The jury in determining whether the bill has been presented in a reasonable time, must, under sub-section 3, have regard "to the nature of the bill, the usage of trade with respect to similar bills and the facts of the particular case," and their verdict is subject to review by the court in the same manner as any other verdict of a jury. The court has no other or greater control of the question than it has of any other determination of a jury.

What is a reasonable time?. Holder's interests to be considered.—The most instructive of the cases cited by the authors referred to, Chalmers and Maclaren, is the case in the Privy Council of "Mullick v. Radakissen, [84] in which the bill was drawn February 16th, at Calcutta, on Hong Kong, payable sixty days after sight. The holder kept it for five months and nine days and then sold it to another, who did not present it till October 24th. Parke, B., affirming the judgment of the court in Calcutta that the bill had not been presented in a reasonable time, said: "The court assumed that the correct principle was laid down fully in the cases of 'Mellish v. Rawdon,'' (9 Bing. 416), which is in accordance with the prior case of 'Muilman v. D'Eguino,' (2 H. Bl. 565), and 'Fry v. Hill,' (7 Taunt. 397), that in determining the question of 'reasonable time' for presentment, not the interests of the drawer only, but those of the holder must be taken into account; that the reasonable time expended in putting the bill into circulation, which is for the interest of the holder, is to be allowed; and that the bill need not be sent for acceptance by the very earliest opportunity, though it must be sent without improper delay. The

[83] *Thayers Preliminary Treatise on Evidence*, 250-253.
[84] 9 *Moore*, P. C., 46.

court, in acting upon that principle, concluded from the evidence that the bill was improperly detained for a portion at least of the time which elapsed between the 16th of February, 1848, when it was drawn, and the 26th of July, when it was indorsed over by Muttyloll Seal, the then holder, to the plaintiff. They thought that the evidence proved that for the whole of that time, a period of more than five months, bills on China were altogether unsaleable at Calcutta, that such was the permanent and regular state of the market; and that although, if there was a reasonable prospect of the state of things being better in a short time, the holder would have had a right, with a view to his own interests, to keep the bill for some time, he had no such right when there was no hope of the amendment of that state of things; and we are of opinion that the evidence fully justified this conclusion from it, and that the court deciding on facts as a jury, were perfectly right. Indeed, we would not have reversed their judgment on a matter of fact, unless we were quite satisfied they were wrong, their knowledge of local circumstances, and the character and appearance of the witnesses, enabling them to form a more correct opinion than a tribunal of appeal in this country possibly could. But, in our opinion, they drew a proper inference from the evidence in the case."

"Wylde et al. v. Wetmore et al." Reasonable time treated as a question of law.—There is a case in the Nova Scotia reports, in which the learned Chief Justice, Sir William Young, squinted at the doctrine, if he did not act on it, that reasonable time for putting the bill in circulation was a question of law. The bill, drawn on Liverpool, England, was indorsed by defendants on 8th October, and the drawer overheld it on the day of indorsement, which was a mail day, and also on the following mail day and sold it on November 5th to the plaintiff, who remitted it on the same day. The bill was accepted but the acceptors failed before it matured, and defendants, when sued as indorsers, pleaded the delay in putting the bill in circulation. It is not stated whether the bill was payable after sight or after date, but it may be inferred that it was the former, and that the delay in transmitting the bill had affected the result. The learned

Chief Justice said: "It may be, as alleged by the defendants, that the bill would have been paid if transmitted at once," which probably means that it would have matured before bankruptcy; but he concluded that the delay had not been excessive, and apparently decided the question on the theory that it was a question of law, citing "Darbyshire v. Parker," 6 East 3, where the question was as to the service of a notice of dishonour, which is a very different kind of question. (See Thayer's Preliminary Treatise on Evidence at page 251.) It is to be observed that in connection with this very case of "Darbyshire v. Parker, the reporter prints two cases on the question whether reasonable notice is a question of fact or law, the second of which concludes with Lord Kenyon's comment on the case of "Lindel v. Brown," in which he says: "I am always better satisfied when I see the sense of a rule laid down; but I own I do not see the sense of the rule there referred to. Whether reasonable notices have or have not been given must depend on the circumstances of the case of which the jury will judge."[85] Wilkins, J., put his concurrence on the perfectly intelligible, but perhaps untenable ground, that if the question had been put to a jury and the jury had found that the delay was unreasonable, it would have been the duty of the court to set the verdict aside. The learned Judge in Equity, Johnstone, E. J., dissented, considering that the question was one on which the defendant had a right to have his defences submitted to a jury, for which there seems to be a good deal to be said. The "ratio decidendi" of the learned Chief Justice, at all events, is wholly inadmissible and it seems a strong proposition to propound that if a jury had found it unreasonable for the drawer to keep the bill in his hands from October 8th to November 5th, the verdict would have been such as no reasonable jury might properly find.[86]

[85] 6 *East.*, 17.
[86] See 11, A. C., at p. 156.

To and by whom presentment for acceptance must be made.

78. A bill is duly presented for acceptance which is presented in accordance with the following rules, namely:—

Must be presented at reasonable hour on business day before overdue.

(a) The presentment must be made by or on behalf of the holder to the drawee or to some person authorized to accept or refuse acceptance on his behalf, at a reasonable hour on a business day and before the bill is overdue;

Where two or more drawees.

(b) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, when presentment may be made to him only;

When drawee is dead.

(c) Where the drawee is dead, presentment may be made to his personal representative;

When sufficient through post office.

(d) Where authorized by agreement or usage, presentment through the post office is sufficient. 53 V., c. 33, s. 41. [E. s. 41.]

Presentment must be by or on behalf of holder.—The definition of "holder" has been given in section 2 (g). He is the payee or indorsee of the bill or note who is in possession of it or the bearer thereof, who is defined in section 2 (d) to be the person in possession of a bill or note which is payable to bearer, that is to say, a bill or note which is on its face made payable to bearer or on which the only or the last indorsement is an indorsement in blank. Section 21 (3).

Must be to drawee or some person authorized to accept or refuse.—Presentment, as Judge Chalmers says,[37] could not properly be made to the servant who opened the door. If not made to the drawee personally, it must be made to someone authorized by him to receive bills for acceptance. "Putting the bill in the bill-box or giving a bill to a clerk in the office in the usual way is, of course, a presentment to the drawee, and a presentment through the post office is sufficient when authorized by

[37] *Chalmers on Bills*, 6th Ed., 138.

agreement or usage (sub-section d.) This, however, touches rather the manner of presentment than the party to whom presentment must be made. "Reasonable diligence must be used to find the drawee or some person authorized to act for him. When the drawee is a trader it is clear that presentment should be made to him at his place of business 'if possible.'"[88] This also touches the manner rather than the party to whom presentment must be made.

Hour and day for presentment.—If the presentment is made to a business man it should be made in business hours, and if at a bank, it should be made in banking hours. If the presentment is made at a dwelling it may be before or after the ordinary business hours, but the hour must be a reasonable one. A "business day" is defined in section 2 (2). It is any day other than a day directed to be observed as a legal holiday or non-juridical day. See sec. 43.

Presentment should be before maturity.—Section 76, ante p. 263, provides for the case where there is not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment. When the bill is accepted or indorsed after maturity, it is deemed under section 23 (2), as against the acceptor who so accepts, or any indorser who so indorses it, a bill payable on demand and should be presented for payment in a reasonable time.

Presentment of bill payable on demand.—Judge Chalmers says:[89] "In the case of a bill which is due or payable on demand," that is one which, by its terms, is made so payable or which is drawn in terms which the statute construes as a bill payable on demand, "presentment for acceptance is merged in presentment for payment." This statement does not seem to be applicable to a bill which is drawn payable at a particular time and becomes payable on demand by an acceptance after maturity. There would still be another presentment for payment which should be made within a reasonable time.

[88] *Chalmers on Bills*, 6th Ed., 138.
[89] *Chalmers on Bills*, 6th Ed., p. 189.

Presentment where more than one drawee.—Where there are two or more drawees, presentment must be made to all unless one has authority to accept for all, and in any case if one has authority to accept for any of the others, presentment to that one is a sufficient presentment to those for whom he has authority to accept. In such case, the person presenting should indicate that an acceptance is required on behalf of the person for whom such drawee has power to act. Otherwise, the presentment would not operate as a presentment to such person. Under section 38 (3 d), the acceptance of only one of two or one or more of several drawees is only a qualified acceptance as to the consequences of taking which, see section 84.

Presentment to personal representative.—This is optional. Under the next following section the holder, where the drawee is dead, may treat the bill as dishonored. Before this enactment the law on this point, Chalmers says, was very doubtful.[90]

Presentment for acceptance compared with presentment for payment.—Judge Chalmers has a valuable note on this subject. "Comparing presentment for acceptance with presentment for payment, it is clear that the two cases are governed by somewhat different considerations. Speaking generally, presentment for acceptance should be personal, while presentment for payment should be local. A bill should be presented for payment where the money is. Anyone can then hand over the money. A bill should be presented for acceptance to the drawee himself, for he has to write the acceptance; but the place where it is presented to him is comparatively immaterial, for all he has to do is to take the bill. Again (except in the case of demand drafts), the day for payment is a fixed day; but the drawee cannot tell on what day it may suit the holder to present a bill for acceptance. These considerations are material as bearing on the question whether the holder has used reasonable diligence to effect presentment."

[90] *Chalmers on Bills*, 6th Ed., p. 180, n. 8.

Excuses for non-presentment.

79. Presentment in accordance with the aforesaid rules is excused, and a bill may be treated as dishonored by non-acceptance,—

Where drawee is dead or fictitious or not capacitated.

(a) where the drawee is dead, or is a fictitious person or a person not having capacity to contract by bill;

Where presentment cannot be effected.

(b) where, after the exercise of reasonable diligence, such presentment cannot be effected;

Where presentment irregular but acceptance refused on other ground.

(c) where although the presentment has been irregular, acceptance has been refused on some other ground.

No excuse that holder believed bill would be dishonored.

(2) The fact that the holder has reason to to believe that the bill, on presentment, will be dishonored does not excuse presentment. 53 V., c. 33, s. 41; 54-55 V., c. 17, s. 6. [E. s. 41.]

Where drawee is dead.—The preceding section permits a presentment to the personal representative where the drawee is dead, but under this section the holder has the option to treat the bill as dishonored.[81]

Where the drawee is fictitious person.—See as to this, section 26 and the comments thereunder, p. 105.

Drawee not having capacity.—The capacity to accept a bill is in general the same as the capacity to enter into any other contract. But with reference to corporations there is a difference. A corporation may have capacity to contract as to certain things in connection with which it could not contract by bill or note. See comments under section 48, p. 148.

Reasonable diligence.—This is a question similar to that of reasonable time, to be determined with regard to all the circumstances of each particular case. See remarks ante p. 264.

[81] *Chalmers on Bills*, 6th Ed., 130.

Drawee has two days to accept.

80. **The drawee may accept a bill on the day of its due presentment to him for acceptance, or at any time within two days thereafter.**

If not accepted within that time must be treated as dishonoured.

2. When a bill is so duly presented for acceptance and is not accepted within the time aforesaid, the person presenting it must treat it as dishonoured by non-acceptance.

Otherwise holder loses recourse against drawer and endorsers.

3. If he does not so treat the bill as dishonoured, the holder shall lose his right of recourse against the drawer and endorsers.

Acceptance of sight bill may be dated any of the days after presentment, not later than day of actual acceptance.

4. In the case of a bill payable at sight or after sight, the acceptor may date his acceptance thereon as of any of the days aforesaid, but not later than the day of his actual acceptance of the bill.

If not so dated holder may refuse it and treat bill as dishonoured.

5. If the acceptance is not so dated, the holder may refuse to take the acceptance and may treat the bill as dishonoured by non-acceptance. 2 E. VII, c. 2, s. 1. [Cf. E. s. 42.]

Section passed to remove doubts.—This section was passed in 1902, as has been stated on a previous page, to set at rest a question raised under the original Bills of Exchange Act. Section 42 of that act provided that when a bill was duly presented for acceptance and was not accepted on the day of its presentment, or two days thereafter, the person presenting it must treat it as dishonored; but it was not considered clear that the holder was not entitled to have the acceptance dated as of the date of the first presentment for acceptance.[92] There was room, therefore, for the contention that an acceptance dated on the last of the two days allowed, or even on the previous day was a qualified acceptance, the taking of which by the holder would discharge non-assenting parties. This section removes all doubt. The holder cannot demand an acceptance dated earlier than the last of the two days, and the days of grace on a sight

[92] *Hansard*, 1902, Vol. I, p. 2455.

draft so accepted only begin to run after the date of the acceptance.[93]

Does the statute apply to a demand draft?—There is nothing in the section to prevent its application to a demand draft, and an acceptance of such a draft would therefore be in order if made on the second day after presentment. Of course it would be immediately due on acceptance, no days of grace being allowed on bills payable on demand, and therefore it is immaterial what date the acceptance should bear, whether that of the presentment or that of the acceptance.

Bill is dishonoured by non-acceptance.

81. A bill is dishonoured by non-acceptance,—

When duly presented and acceptance refused or cannot be obtained.

(a) when it is duly presented for acceptance, and such an acceptance as is prescribed by this Act is refused or cannot be obtained; or

When presentment excused and bill not accepted.

(b) when presentment for acceptance is excused and the bill is not accepted. 53 V., c. 33, s. 43. [E. s. 43.]

Cross reference.—The rules as to due presentment for acceptance are given in section 78 (ante page 268.) The circumstances that excuse acceptance are found in section 79 (ante p. 271.)

Presentment excused.—The clause referred to in the preceding note provides that presentment is excused where the drawee is dead, or is a fictitious person, or a person not having capacity to contract by bill; where, also, after the exercise of reasonable diligence such presentment cannot be effected, and where, although the presentment has been irregular, acceptance has been refused on some other ground. In all these cases the bill is dishonored by non-acceptance unless there has been an actual acceptance. In some of these cases it is obvious that there could be an acceptance notwithstand-

[93] See comments on page 126, where the question is raised as to the proper date of an acceptance of a bill dishonoured by a refusal to accept and afterwards accepted.

ing that presentment for acceptance is not necessarry because it is excused by the force of the statute. In others there could be no acceptance. For instance, in the case of the bill drawn on a fictitious person, that is in the natural sense of the term fictitious.

When dishonoured by non-acceptance immediate right of recourse; no presentment for payment necessary.

82. Subject to the provisions of this Act, when a bill is dishonoured by non-acceptance an immediate right of recourse against the drawer and endorsers accrues to the holder, and no presentment for payment is necessary. 53 V., c. 33, s. 43. [E. s. 43.]

Cross references.—The provisions referred to in this section and to which the section is subject are those relating to acceptances for honor, section 147 and following sections, and section 33, which provides for the naming of a referee in case of need, the former of which are commented on at a later page, and the latter at page 110 ante.

Action against drawer or indorser must be preceded by notice of dishonor.—Although it is provided that in the event of dishonor of the bill by non-acceptance, whether by refusal to accept or because acceptance cannot be obtained, or has been excused under the operation of the foregoing rules, the holder has an immediate right of recourse to the drawer and indorsers, the action must be preceded by a notice of dishonor, and the holder must allow sufficient time for the notice of dishonor to reach the parties before bringing his action. This at least is the inference that Mr. Justice Maclaren* draws from the case of "Castrique v. Bernabo,"[94] where the notice was put into the post office the same day that the action was brought for dishonor by non-payment. Lord Denman, C. J., said that where there was a doubt which of two occurrences took place first, the party who was to act upon the assumption that they took place in a particular order was to make the inquiry. The plaintiff in this case had to show that a right of action existed before he

* *Maclaren on Bills*, 3rd Ed., 240, 256.
[94] 6 Q. B., 498 (1844).

commenced his suit, and there was no proof that the writ had not been issued before the notice of dishonor for non-payment could have been received by the defendant. In the case of a foreign bill, protest would also be necessary before action.

Holder may refuse qualified acceptance and treat bill as dishonoured.

83. **The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance.**

Drawer or endorser held to assent unless dissent expressed in reasonable time.

2. When the drawer or endorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder, he shall be deemed to have assented thereto. 53 V., c. 33, s. 44. [E. s. 44.]

Qualified acceptance without authorization or assent discharges drawer or endorser not assenting. Proviso as to partial acceptance.

84. **Where a qualified acceptance is taken, and the drawer or an endorser has not expressedly or impliedly authorized the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or endorser is discharged from his liability on the bill: Provided that this section shall not apply to a partial acceptance, whereof due notice has been given.** 53 V., c. 33, s. 44. [E. s. 44.]

Partial acceptance, though qualified, does not discharge non-assenting parties.—We have seen (ante p. 129), that an acceptance for part only of the amount drawn for is a qualified acceptance. It may be declined by the holder, who may, if he chooses, treat the bill as dishonored; but if he prefers to take such an acceptance he can do so without discharging the drawer or indorsers. This is one of the amendments effected by the codifying act by way of proviso to section 84, which enacts that where a qualified acceptance is taken, the drawer or indorsers are discharged, "Provided that this section shall not apply to a partial acceptance whereof due notice has been given." Observe that it is still requisite that due notice should be given of the fact that the bill has been accepted only for part, and if it be a

foreign bill the notice must be in the form of a protest. "Where a foreign bill has been accepted as to part it must be protested as to the balance." Sec. 112 (3).

PRESENTMENT FOR PAYMENT.

Bill must be duly presented for payment.

85. Subject to the provisions of this Act, a bill must be duly presented for payment.

Otherwise drawer and endorsers discharged.

2. If it is not so presented, the drawer and endorsers shall be discharged. 53 V., c. 33, s. 45. [E. s. 45.]

Cross references.—The provisions referred to are those contained in sections 89, 92 and 93.

3. Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment. 53 V., c. 33, s. 52. (4). [E. s. 52. (4).]

Cross reference.—See section 89 for the provision in reference to the case where no person authorized to pay or refuse payment can be found.

86. A bill is duly presented for payment which is presented,—

Bill must be presented the day it falls due

(a) when the bill is not payable on demand, on the day it falls due. [E. s. 45.]

Demand bill must be presented within reasonable time after issue to render drawer liable and reasonable time after endorsement to render endorser liable.

(b) when the bill is payable on demand, within a reasonable time after its issue, in order to render the drawer liable, and within a reasonable time after its endorsement, in order to render the endorser liable.

Regard had to nature of bill, usage of trade and facts of particular case.

2. In determining what is a reasonable time within the meaning of this section regard shall be had to the nature of the bill, the usage of trade with regard to similar bills and the facts of the particular case. 53 V., c. 33, s. 45. [E. s. 45.]

Cross reference. Cheque.—See notes under section 166.

Presentment before maturity or after bill due.—Presentment before maturity is a nullity, and presentment on the day after the bill is due is equally so unless the delay is excused under one or other of the provisions of the statute. (See section 91.)

Rule as to note payable on demand.—The rule as to presentment of a bill payable on demand is applicable, "mutatis mutandis," to a note payable on demand, with the proviso that if, with the assent of the indorser, a note on demand has been delivered as a collateral or continuing security it need not be presented for payment so long as it is held as such security. Sec. 181

Reasonable time; is it a question of law?—The reasonableness or otherwise of the time for presentment of a bill payable on demand, seems to be treated by Mr. Justice Maclaren as a mixed question of law and fact,[95] As to this form of words, the note under section 77, at page 264 ante, may be consulted. In "Turner v. Iron Chief Mining Co.,"[96] the court say, after referring to a large number of American cases: "The cases also firmly establish the rule that where, as here, the material facts are admitted or not in dispute, the question as to what constitutes a reasonable time for making such demand and giving such notice, is one of law for the court." To the same effect is the judgment in "Parker v. Reddick,"[97] "What constitutes reasonable time in such cases is a question of law to be determined by the court when the facts are ascertained." The better American opinion, nevertheless, seems to be that the question is for the jury under proper instructions.

Proper hour for presentment.—Parker, M. R., in the case of "Patterson v. Tapley,"[98] refers to the necessity of showing the time and manner of the presentment, that the court may judge whether it was proper and reasonable. The burden of showing this was in this case treated as being upon the holder, and where the witness was not asked at what hour of the day pre-

[95] Compare *Maclaren on B. & N.*, 3rd Ed., p. 24[illegible], with the note on page 243 of the same book.
[96] 74 Wisconsin, 355 (1889), *Huffcutt's Cases on Neg. Inst.*, 504.
[97] 65 Miss., 242 (1887), *Huffcutt's Cases on Neg. Inst.*, 307.
Allen, N. B., 292 (1859).

sentment had been made, and it was in proof that the store was found closed, the court drew the inference that it had been closed in due and regular course of business, and that the presentment had therefore been made at an unreasonable hour. Referring to this subject, Mr. Justice Maclaren points out some differences between this and the next following clauses, and the corresponding clauses of the Imperial Act.* Under the latter it is provided that the presentation must be made by the holder or some person authorized to receive payment on his behalf "at a reasonable hour on a business day," at the proper place to the person designated by the bill as payer, or some person authorized to pay or refuse payment on his behalf. The words in quotation marks are not in the Canadian act, and the Imperial act omits the words providing for presentment to the representative of the person designated by the bill. The hours in which presentment for payment must be made are not specified, but section 121 (b) provides that a protest for non-payment may be made at any time after three o'clock in the afternoon. Judge Chalmers adds that the reasonableness of the hour for presentment must depend on whether the bill is payable at a place of business or at a private house. The payor is not bound to stay at his place of business after an unreasonable hour. If a bill be payable at a bank it must be presented in banking hours; if at a trader's place of business, during ordinary business hours; if at a private house, probably a presentment up to bed time would be sufficient.[99] There is a degree of vagueness about the latter part of this statement of the law. Lord Kenyon was inclined to hold that the obligation to pay a bill, like that for rent, was to pay at any time on the last day of grace; but Buller, J., dissented emphatically, holding that the rules as to payment of rent could not be applied to the case of a bill of exchange. He stated the usage to be that they were payable at any time on the last day of grace, provided the demand were made within reasonable hours.[100] As to bankers it was settled that the presentment must be

* *Maclaren on Bills*, 3rd. Ed., 244.
[99] *Chalmers*, 6th Ed., 147.
[100] *Leftley* v. *Mills*, 4 T. R., 170.

made in banking hours.[1] As to an ordinary trader, Best, C. J., in "Triggs v. Newnham,"[2] quotes Lord Ellenborough to the effect that "a common trader is different from bankers, and has not any peculiar hours for paying or receiving money. If presentment had been during the hours of rest, it would have been altogether unavailing; but eight in the evening cannot be considered an unreasonable hour for demanding payment at the house of a private merchant, who has accepted a bill." In "Wilkins v. Jadis,"[3] it was contended that this presentment had been held good because the house had been found open, but that the holder took the risk in such a case of finding the house closed. In this case the presentment seems to have been made at a dwelling house between 7 and 8 o'clock, there being no one at home. It was held a good presentment. The distinction is sharply made between banking houses and other places, but no distinction is suggested between a trading house and a dwelling house. In the case of the banking house, the presentment must be within banking hours. In all other cases it must be in reasonable hours, and the question to be considered in all cases is whether the bill was presented at a reasonable hour.

Mr. Lash has given an opinion on these questions which will be found in the Journal of the Canadian Bankers' Association.* He suggests that as nothing is said about the hour for presentment for payment while there is a such a provision in the clause referring to presentment for acceptance, it might be plausibly argued that the holder had the whole day for presentment of the bill for payment. He, however, rejects this view and holds that the bill must be presented at a reasonable hour, otherwise it could not be said that reasonable diligence had been exercised to find the proper person at the proper place to whom the bill could be presented. He refers to English cases tending to show that if the bill is made payable at a banker's it should be presented in

[1] *Elford v. Teed*, 1 M. & S., 28.
[2] 10 *Moore*, 249 (1825).
[3] 2 B. & Ald., 131 (1831).
* 9 J. C. B., 237.

banking hours, but cites a New York case of "Utica v. Smith,"† in which a note was payable at the Mechanic's Bank, New York City, and was presented at 3.15 p. m., but it was customary for clerks to remain after that hour, during which notes were presented and paid or refused. The court said "though the presentment was out of banking hours, it is sufficient if there was a person at the bank authorized to give the holder an answer." The rest of the opinion seems to be in substantial accord with what has been written above.

Presentment must be made by holder or some person authorized to receive payment on his behalf at proper place to the payer or representative or some person authorized to pay or refuse payment if with reasonable diligence he can be found there.

87. Presentment must be made by the holder or by some person authorized to receive payment on his behalf, at the proper place as hereinafter defined, and either to the person designated by the bill as payer or to his representative or some person authorized to pay or to refuse payment on his behalf, if, with the exercise of reasonable diligence such person can there be found.

Must be made to each of several acceptors unless partners.

2. When a bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all.

When drawee is dead and no place of payment named presentment must be to personal representative if there is one and he can with reasonable diligence be found.

3. When the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there is, and with the exercise of reasonable diligence, he can be found. 53 V., c. 33, s. 45. [E. s. 45.]

Cross references.—See the next following section as to the proper place for presentment, and the next preceding section as to the proper hour for presentment. Reference is also made in the last preceding note to the difference between the Imperial and the Canadian Act in respect to the matters with which these sections deal.

† 18 *Johns N. Y.*, 230.

Proper place of presentment is.

88. A bill is presented at the proper place,—

Place named in bill or acceptance.

(a) where a place of payment is specified in the bill or acceptance, and the bill is there presented;

Address of drawee or acceptor.

(b) where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented;

If no address given or place named, then the place of business if known, otherwise residence if known.

(c) where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business, if known, and if not, at his ordinary residence, if known;

In other cases wherever acceptor can be found or last known place of business or residence.

(d) in any other case, if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence. 53 V., c. 33, s. 45. [E. s. 45.]

When bill presented at proper place and no person found after reasonable diligence no further presentment required.

89. Where a bill is presented at the proper place as aforesaid, and after the exercise of reasonable diligence, no person authorized to pay or refuse payment can there be found, no further presentment to the drawee or acceptor is required. 53 V., c. 33, s. 45. [E. s. 45.]

Place named in the acceptance.—It will have been noticed that there is an important difference between the English and the Canadian act in reference to the naming of a place of payment in the acceptance. If a drawee accept in England payable at a particular place and not elsewhere, this is a qualified acceptance, and it is only in the absence of such words making the bill payable at the particular place and not elsewhere that the acceptance to pay at a particular place is a general acceptance. Under the Canadian Act, an acceptance to pay at a particular place is not on that account a qualified acceptance. The effect of this distinction has been discussed on a previous page.[4] The distinction, more-

[4] See page 129.

over, has nothing to do with the fixing of the liability of the drawer or indorsers. In "Gibb v. Mather, et al,"[5] it was fully explained that the statute which was passed to remove the doubts which the House of Lords had considered in "Rowe v. Young," and by which it was declared that an acceptance to pay at a particular place was not a qualified acceptance unless it added words making the bill payable there only, or equivalent words, applied only to a question between the holder and the acceptor. It was just as necessary after the statute as it was before to present the bill at the place named in the acceptance in order to charge the drawer or indorsers. Hence Judge Chalmers says that the place of payment may be specified either by the drawer or by the acceptor. When Mr. Justice Maclaren, in his comment on this section, says that, "in England it is only when the acceptance states that the bill is to be paid at a particular place and not elsewhere, that it must be presented there," he must be understood to be speaking only of the presentment required to charge the acceptor. It is still, as already stated, necessary in England to present the bill at the place named in the acceptance, even when the restrictive words are not used, in order to charge the drawer and indorsers. The Canadian act obviates all question on this point by its express mention in the statute of the naming of a place of payment by the acceptor. The bill must be presented at that place, as in England, in order to hold the drawers and indorsers, and it should be presented there in order to bind the acceptor; but we shall see in commenting upon section 93, that there is some question about this.

Bill payable at particular place must be presented there to charge indorser.—This has been stated in the preceding note. In "Beirnstein v. Usher & Co,"[5a] the bill was payable at 1., Picton Place, Swansea. Instead of being presented there it was presented to the acceptor personally at Newport, and Kennedy, J., held that the defendant indorser was discharged.

[5] 2 Cr. & J., 254.
[5a] 2 J. C. B., 557.

Bill drawn payable at one bank; accepted payable at another.—The question is asked in the Journal of the Canadian Bankers' Association where a bill should be presented for payment which has been drawn payable at the Canadian Bank of Commerce, Montreal, and accepted payable at the Merchants' Bank of Canada, Montreal.[35] The answer given is that "section 17 2 a 38 (4) of the present act), declares this acceptance to be 'not conditional or qualified,' therefore, it is a general acceptance, that is, an unqualified assent by the drawee to the order of the drawer: in this case an undertaking to pay as the drawer has instructed, namely, at the Canadian Bank of Commerce. The bill may therefore be paid at the latter bank. Sub-section 2 of section 45 (see section 88 (a) of the present act), declares that where a place of payment is specified in the bill or acceptance, and the bill is there presented, such presentment is properly made. Under this rule it would seem proper to present the bill at the place named by the acceptor so that the effect of the whole is to give the holder the right to present for payment at either place. The provisions of the act were evidently intended to legalize the previously existing practice of naming the place of payment in the acceptance and not in the body of the bill (a practice of unquestioned convenience), and there has been no case before the courts since where a different place has been named in each. As the cases must be rare we should think it best to present such acceptances at both places named and so avoid all doubt."

The statement here made that an acceptance payable at a different place from that named by the drawer is a general acceptance, is at variance with the view presented by Mr. Justice Maclaren, and it does not seem reasonable to say that it is "an unqualified assent to the order of the drawer." See note at page 131, ante.

Bill payable at a bank being at the place is equivalent to presentment there.—If a bill is made payable at a bank or other place, and is at the place of payment at maturity and the acceptor has no assets there, this is a sufficient presentment. In fact, it is a sufficient pre-

[35] 7 J. C. B., 157.

sentment whether there be assets there or not. The question of assets only goes to the point whether the bill has been dishonored or not.

Acceptance payable at a banker's is authority to banker to pay anyone who can give a discharge.—In "Robarts v. Tucker,"[6] Parke, B., says: "There can be no question that making the acceptance payable at a banker's is tantamount to an order on the part of the acceptor to the banker to pay the bill to the person who is according to the law merchant capable of giving a discharge for the bill." But this, of course, does not authorize payment on a forged indorsement. In Vaglianos' case,[6a] the indorsement was forged, but the bill was held to be payable to bearer without any indorsement. Therefore, it did not matter that the indorsement had been forged. This, however, belongs to another branch of the law. See page 87.

Presentment at clearing house sufficient.—Mr. Justice Maclaren says it has been held in England that if a bill is payable at a bank in a town where there is a clearing house, presentment through the clearing house is sufficient.[7] The cases cited were decided in 1811 and 1833.

Alternative places of payment.—A nisi prius case is cited by Mr. Justice Maclaren[7] to the effect that where alternative places of payment are named it is sufficient to present the bill at one of the places so named. "Beeching v. Gower."[8]

Payable "at any bank."—"A note made in Boston, payable 'at any bank' means any bank in Boston."[9] The case cited for this is "Baldwin v. Hitchcock."[10] The restriction of the phrase to banks in Boston, follows from the dating of the note. The case was treated as too

[6] 16 Q. B., at 577.
[6a] 1891, A. C., 107.
[7] *Maclaren on Bills*, 3rd Ed., p. 247.
[8] *Holt*, N. P. C. 313 (1816).
[9] *Maclaren on Bills*, 3rd Ed., p. 752.
[10] 1 *Hannay*, N. B., 310 (1869).

plain for argument. The note being dated at Boston would be payable in Boston, and the phrase "at any bank," could not widen the area. "They must be taken," said Ritchie, C. J., "to mean any bank in the place where the note was made, for it would be absurd to suppose that the makers are required to keep funds for the payment of the notes in banks all over the world."

Payable at a bank having several agencies.—On the analogy of the case in New Brunswick* it follows that if a note is made at Brandon, Manitoba, "payable at the Imperial Bank," such note is payable at the agency of the bank in Brandon, and not at the head office; for which Maclaren, J., cites "Commercial Bank v. Bissett."[11]

Where drawee or acceptor not found, reasonable diligence necessary.—The presentment at the proper place does not necessarily in itself suffice to charge the drawer or indorsers. If the drawee has named no place of payment, the proper place for presentment is "prima facie" his last known place of business or residence; but Mr. Justice Maclaren cites a case, "Browne v. Boulton,"[12] in which the note, payable generally, was left with a banker for collection in the town where the maker lived. Before the note matured he had left town. A clerk went to present it at the house where he had formerly lived, and could not there learn where he had gone to. He had heard, before the note matured, that the maker had left town, but had heard different reports as to where he had gone. No inquiry was made at any of these places. It was proved that his leaving was no secret, and his business partner was not asked as to his whereabouts. Robinson, C. J., speaking for the court, held that at least inquiries should have been made at the places to which it was reported that the maker had gone, and that the want of diligence was so clear that the question might have been withdrawn from the jury, or, at all events, should have been put to the jury with the instruction that due diligence had not been used. This is in line with the case also cited by Mr. Justice Maclaren from the

* See preceding note.
11 *Maclaren on Bills*, 3rd Ed., 247; 7 Man., 586 (1891).
12 9 U. C. Q. B., 64.

Massachusetts reports, "The Granite Bank v. Ayers,"[13] in which the holder of a note made by a firm presented it at their last place of business in Boston, which was then occupied by strangers, and was there told that the firm had failed and that the partners had gone out of town without leaving any funds. No inquiry was made by the holder in relation to them except at that place, although, in fact, one of the firm lived in Boston, and his name and place of residence were in the city directory. The information given at the last place of business, that the promisors had gone out of town, was, therefore, not correct, and Chief Justice Shaw held, in the action against the indorser, that there had been no presentment of the note, and no sufficient excuse for non-presentment.

Bill payable at the office of payee. Payee dead and office closed.—The case is presented in a question in the Journal of the Canadian Bankers' Association of bill accepted payable at the office of the payee, who dies before the bill is mature and whose office is closed.* The answer is that in such a case the note must be presented at the former office and if it is refused or there is no one there to answer, the bill should be protested. The case is simply one in which due diligence is required under the section now under consideration, and the statute provides that if, with due diligence, no person authorized to pay or refuse payment "can be there found," (not if no person can be found), any further presentment is unnecessary.

Is the question of reasonable diligence for the court or jury.—In the Upper Canadian case referred to in the last preceding note, the reporter's headnote contains a "semble" that the question of diligence is not wholly a question for the jury, and Robinson, C. J., referring to the contention that it was for the jury to say whether due diligence had been used and that the question was in fact submitted to them, says: "That point, however, may be stated too generally. Where it is obvious that nothing like what the law deems diligence has been used

[13] 16 Pick., 392.
* 6 J. C. B., 387.

the court will direct the jury that the party has not made out an excuse that can relieve him." It is submitted that the question is one wholly for the jury in the same sense in which any other question of fact is for the jury; that is to say, that if there is no evidence on which a reasonable jury could come to a conclusion that due diligence had been used, the question of fact could be withdrawn from the jury.[14]

Quaere. Does the requirement of due diligence apply where a place has been named in the acceptance or address given.—In the Upper Canada case cited in last note, a case was referred to of "Hine v. Allely,"[15] but the Chief Justice, (Robinson), pointed out the distinction that in the case so cited a place of payment had been named; that is to say, the bill had been addressed to the drawee at No. 6 Bridge Row, and the holder treated it as dishonored, having gone to the house and found it closed. The court said that the bill was dishonored so soon as the indorsee went to the house at which it was made payable and found it closed, because, by the acceptance, the drawee had engaged to be ready there with funds to pay it when due.

In "Brixton v. Jones,"[16] also, the bill was addressed to the drawee at 38 Minto Street, etc., and was accepted generally, by which Tindal, C. J., said he adopted the description of his residence as stated at the foot of the bill. The messenger inquired for the acceptor and was informed that he had gone. Tindal, C. J., said, "It was not necessary to present the bill to him personally. If he chose to remove from the house pointed out by the bill as his place of residence, he was bound to leave sufficient funds on the premises."

The statute, it will be observed, does not limit the requirement of reasonable diligence to the cases where the bill is payable generally. It applies in terms to every case where the bill is presented at the proper place and after the exercise of reasonable diligence no person authorized to pay or refuse payment can be found there. It is only when these conditions have been satisfied that

14 See note at page 264.
15 1 N. & M., 433.
16 1 M. & G., 364.

the statute says that no further presentment to the drawee or acceptor is required. But the statute does not seem to call for a search elsewhere than at the place named.

Presentment at post office.—Section 90 seems rather to confuse this whole question by providing that where the place of payment is a city, town or village, and no place therein is specified, and the bill is presented at the drawee's or acceptor's known place of business, or known ordinary residence, and if there is no such place of business or residence, the bill is presented at the post office or principal post office in such city, town or village, such presentment is sufficient. The provisions of this section seem to be wholly inconsistent with the requirement of any diligence or effort to find the acceptor. The section does not occur in the Imperial Act. It was introduced as an amendment to the bill as drafted,[17] and it is possible that it was so intended, that is, to do away with the requirement as to diligence; but if that is the purpose, it is to be regretted that the other section was not amended so as to be consistent with this idea. The sections, as they stand, are confusing.

Where place of payment is a city, town or village and no place therein specified presentment sufficient at drawers or acceptors known place of business or known ordinary residence or if none then at post-office.

90. Where the place of payment specified in the bill or acceptance is any city, town or village, and no place therein is specified, and the bill is presented at the drawee's or acceptor's known place of business or known ordinary residence therein, and if there is no such place of business or residence, the bill is presented at the post office, or principal post office in such city, town or village, such presentment is sufficient.

2. Where authorized by agreement or usage, a presentment through the post office is sufficient. 53 V., c. 33, s. 45. [Cf. E. s. 45.]

Cross references.—See remarks under sections 88 and 89, page 281. The cases there referred to seem to show that where a place is specified, presentment there is sufficient, and this section says that if no place is specified, presentment at the known place of business, or

[17] See *Hansard*, 1890, p. 1418.

known ordinary residence is sufficient, and if there is no known place of business or known ordinary residence, a presentment at the post office or principal post office is sufficient. Section 88 requires that in such a case as last mentioned, presentment should be made at the acceptor's last known place of business or residence, and even so, if the acceptor is not found, section 89 seems to require diligence to find him before the drawer and indorser can be charged. This somewhat haphazard amendment seems to say that the holder who has presented the bill at the actual known place of business or residence of the acceptor, or at the post office, if there is no such place of business or residence, has done all that he is obliged to do. He need not present it at the last place of business or residence, and is not called upon to make any inquiries or use any diligence whatever to effect a personal presentation. It remains to be seen whether it will be so interpreted, and how it will be harmonized with the other sections of the act.

Post office or principal post office.—The use of these words indicates that if there is more than one post office in a city, town or village, the presentment should be made at the principal post office

Delay excused when caused by circumstances beyond control of holder and not imputable to his fault.

91. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence.

Reasonable diligence necessary after cause of delay ceases to operate.

2. When the cause of delay ceases to operate, presentment must be made with reasonable diligence. 53 V., c. 33, s. 46. [E. s. 46]

Iluustrations of excuse for delay in presentment.—Mr. Justice Maclaren gives as illustrations under this section, and instances in which the excuse for delay has been held valid, a number of cases from the reports; for example, where there was a request from the drawer or indorser sought to be charged,[18] where the note was

[18] *Bennett* v. *Monaghan*, 1 *Revue critique*, M'real 473; *Lord Ward* v. *Oxford Railway Co.*, 2 D. M. & G., 750 (1852).

lying at a branch bank at which it was payable, and the new agent was not aware of its being there until noon of the day after maturity, when he had it protested and notice given; and this was held sufficient to bind the indorser;[19] where the holder was dead;[20] where a state of siege or war rendered presentment impracticable;[21] where a moratory law, passed in consequence of war, postponed the maturity of bills;[22] where the delay occurred in the post office, the bill having been mailed in ample time.[23] The same illustrations are given by Judge Chalmers, except that, as to the case where the holder is dead, he only says that the circumstances may be such as to excuse delay, and in the case of delay resulting from mistake in the post office, he says the delay is (probably) excused. He adds that, "The cases do not clearly distinguish between excuses for non-presentment and excuses for delay in presentment, but when the question is one of reasonable diligence, the distinction is an important one."[24]

Presentment not made because bill lost in the mails.— A question is asked in the Journal of the Canadian Bankers' Association as to the case of a bill lost in the mails,* and as to the liability of the bank in such a case. The answer deals with that question and the writer proceeds to say that "the liability of the endorser would be preserved if, where the cause of delay ceases to operate, even though the note were ten days overdue, presentment be made with reasonable diligence and notice of dishonor sent. * * * There appear to be no English cases covering the point, but there are some American cases in which it was held that delay in the post office, when a bill is mailed in good time, is a valid excuse for delay in presentation.

[19] *Union Bank* v. *McKilligan*, 4 Man., 29. (It is questionable whether this was correctly decided).

[20] *Rothschild* v. *Currie*, 1 Q. B., at 47.

[21] *Patience* v. *Townley*, 2 Smith, 223; *Bond* v. *Moore*, 93 U. S., 593.

[22] *Rouquette* v. *Overman*, L. R., 10 Q. B., 525.

[23] *Windham Bank* v. *Norton*, 22 Conn., 213; *Pier* v. *Heinrichshoffen*, 29 Am. Rep., 501

[24] *Chalmers on Bills*, 5th Ed., 151, 152.

* 5 J. C. B., 347.

Presentment dispened with.

92. Presentment for payment is dispensed with,—

Where impossible after exercise of reasonable diligence.

(a) where, after the exercise of reasonable diligence, presentment, as required by this Act, cannot be effected;

When drawee is fictitious person.

(b) where the drawee is a fictitious person;

As regards drawer where drawee is not bound as between himself and drawer to accept or pay, and drawer has no reason to believe bill will be paid.

(c) as regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented;

As regards indorser when it was for his accommodation and he had no reason to believe bill would be paid.

(d) as regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented;

By waiver, express or implied.

(e) by waiver of presentment, express or implied.

Cross reference.—See section 34b as to express waiver on the instrument.

Reasonable diligence.—It is difficult to see how, under the provisions of the act, there can ever be any necessity for diligence, or any excuse for non-presentment. Every conceivable case of difficulty in making presentment seems to be provided for by making that which is not presentment in fact, to be a presentment such as is "required by the act.' Where a place of payment is named, the cases seem to show that presentment there is sufficient without any effort to make a personal presentment. Where a place is not named, section 90 provides exhaustively for a constructive presentment which the section says will be sufficient.

Fictitious drawee.—Where the drawee is a fictitious person, even the presentment otherwise required by the act is dispensed with. Of course a personal presentment could not be made in such a case, but the presentment "required by the act" could be made even in the case

of a fictitious drawee, but it need not be made. Section 26 moreover provides that where the drawee is a fictitious person, the holder may, at his option, treat the instrument as either a bill or a note. The term "fictitious person" has been defined, in "Bank of England v. Vagliano Brothers,"* in the case of a payee to include the case where the name of an actual existing person is "inserted by way of pretence merely, without any intention that payment shall only be made in conformity therewith." The same interpretation will perhaps be applied to the case of a drawee, although in the case of drawee, the term fictitious alone is used, while in the case of a payee the term used is "fictitious or non-existing." It was the term "fictitious," and not the term "non-existing," that the argument turned upon in Vagliano's case.

Acceptance for accommodation of drawer.—Clause (c) applies to the case where the bill has been accepted for the accommodation of the drawer. The language of this section suggests the possibility of a drawer being discharged by non-presentment, if he had reason to believe that the bill would be paid if presented, although it was accepted for his accommodation. If the acceptor is not bound as between himself and the drawer to pay the bill, the drawer should not be discharged by the non-presentment, no matter what he had reason to believe as to the acceptor's readiness and willingness to pay it, and the holder should not have his rights dependent upon what might happen to be in the drawer's mind on that subject. If in the case supposed, the acceptor had met the expectations of the drawer by paying the bill, he would have had recourse against the drawer, the party accommodated and ultimately liable. Why, then, should the drawer in such a case be allowed to set up the want of presentment to the acceptor? The doctrine that he is discharged by such want of presentment seems to have come into the act by way of Chalmer's Digest,[25] in which it is founded on the decision in "Worth v. Austin."[26] This case in turn is founded on the form of pleading in "Bullen & Leake," 3rd ed.,

* See page 87, (ante.)

[25] *Chalmer's Digest*, p. 130, 131.

[26] L. R., 10 C. P., 689 (1875).

p. 99, and the form is said by Coleridge, C. J., to be based on "Terry v. Parker."[27] If this is the foundation of the doctrine, it rests upon a statement in the headnote not warranted by the decision. Nevertheless, it would not be safe to ignore this condition, now that it has become part of the statute. The effect of the statute seems to be that a pleading that the presentment for payment was dispensed with under this section, would not be complete without setting forth the double condition: first, that the drawee or acceptor was not bound, as between himself and the drawer, to pay the bill; and secondly, that the drawer had no reason to believe that the bill would be paid if presented.

Acceptance for accommodation of indorser.—The remarks in the last preceding note apply equally to this topic.

Waiver of presentment.—Maclaren and Chalmers give a number of cases to illustrate waiver of presentment. The waiver may be before or after the time for presentment. It may be in writing or verbal, or may be inferred from conduct or circumstances. It may be on the bill itself.[28] A declaration of inability to pay, and request for time, is a waiver as regards the party making it.[29] A promise to pay after the bill is due with knowledge of the facts, is a waiver.[30] Part payment is also a waiver.[31] An offer to give new notes which the holder does not accept, is not a waiver.[32] In one of the cases cited the defendant had indorsed to plaintiff as security for a debt due plaintiff, the promissory note of a medical doctor, who absconded before the maturity of the note. On the day the note fell due, plaintiff took the note to defendant at whose house the doctor had resided, saying he supposed it was of no use to anyone. Defendant handed it back to plaintiff saying that plaintiff might as

[27] 6 A. & E., 502 (1837).
[28] *Maclaren on Bills*, 3rd Ed., p. 254.
[29] *McDonnell* v. *Lowry*, 3 U. C. O. S., 302.
[30] See cases cited in Illustration 2, *Maclaren on Bills* 3rd Ed., 254. See also next following note.
[31] *Rice* v. *Bowker*, 3 L. C. R., 305; *sed quære*, if the person making payment did not know the facts.
[32] *Bank of New Brunswick* v. *Knowles*, 4 N. B. (2 Kerr), 219.

well keep it for the present. There was no formal presentment, and plaintiff applied to defendant for payment several times afterwards. Defendant neither promised to pay nor refused payment till several months after, when he claimed that plaintiff was paid by the note. The judge directed the jury that the evidence as to what took place on the day the note fell due warranted them in inferring that the defendant had dispensed with the presentment, and the court sustained this ruling, and held that notice of dishonour was not necessary, as the defendant must have understood that the plaintiff required him to pay the note.[33]

A British Columbia case,[34] "Burton v. Giffin," holds that waiver of demand of payment is a waiver of presentment, but Mr. Justice Maclaren cites an English case as holding that a waiver of notice of dishonor is not waiver of presentment; "Hill v. Heap." This case will be referred to latter in commenting on sub-section 2 of section 92.

No waiver without knowledge of the facts.—In one of the illustrations given in the last note, it was said that promise of payment with knowledge of the facts was a waiver. The necessity for this knowledge as an element in a case of waiver was insisted upon in "Evans et al. v. Foster,"[35] where the county court judge, setting aside a plea of waiver, had said as to a promise of payment: "I must assume that the defendant made this promise with full knowledge of the want of presentment." Weatherbe, J., pointed out that the principle of the decision relied on by the county court judge, "Croxen v. Northern,"[36] was that the defendant was supposed to know the law. "He knows, therefore, that he is not liable unless the note has been duly presented. With that knowledge, he undertakes to pay it. Is not that evidence for the jury that he knows it was presented? . . . A distinction often lost sight of is that the promise to pay is to be regarded as a waiver of proof of presentment, and not as a waiver of presentment

[33] *Master* v. *Stubbs*, 4 Allen, N. B., 453 (1860).
[34] 5 B. C. R., 454 (1897)
[35] 1 R. & G., 66 (1879).
[36] 5 M. & W., 5.

itself. The promise to pay, it seems, is only to be regarded as 'prima facie' evidence, and is open to rebuttal." It is doubtful if the subtle distinction here drawn is drawn with accuracy. If it is waiver of the proof, how can the acceptor or indorser so waiving ever call on the plaintiff to prove the presentment, or offer facts himself to disprove it It is not that the promise to pay is "a waiver of the proof of presentment." It is proof of the waiver of presentment, but only "prima facie" proof, and therefore liable to be rebutted. The reason why it is "prima facie" proof seems to be that the party making the promise is presumed to know the law, and therefore to know that he was not liable to pay unless the bill was presented. The promise is therefore "some evidence for the jury." His ignorance of the legal effect of the non-presentment will not prevent his promise from being a waiver if he was aware of the fact that the bill had not been presented.

Waiver affects only the party waiving.—A waiver of presentment by the payee and indorser of a note does not affect the position of the maker. In "McLellan v. McLellan,"[37] there was a waiver such as described, and this was put to the jury as evidence against the maker. But the court said, per Wilson, J.: "The learned judge seems to have overlooked the fact that, as against the endorser it was evidence to preclude him from setting up what he had waived; but the maker was a stranger to that admission, and it could in no way be evidence against him."

Waiver requires no consideration.—In the New Brunswick case of "Master v. Stubbs,"[38] the contention was made that any promise to pay after the note was due and had not been presented, was of no avail without consideration. And this would be true if the promise were relied on as a cause of action. It is only of effect as evidence that the defendant has dispensed with one of the conditions precedent to his liability, and it is well settled that the waiver is good without consideration.

[37] 17 U. C. C. P., 109 (1866).
[38] 4 *Allen*, N. B., 453 (1860).

Belief that bill will be dishonored, does not dispense with presentment.

92. (2) The fact that the holder has reason to believe that the bill will, on presentment, be dishonored, does not dispense with the necessity for presentment. 53 V., c. 33, s. 46. [E. s. 46.]

Order from drawer not to pay.—In the Ontario case of "Blackley v. McCabe,"[39] a cheque was drawn on a private banker and was not presented. The holder had the whole of a certain day in which to present it, and before the expiration of that time the bank suspended, whereupon the drawer of the cheque gave notice of action to the bank, or rather served a writ on them, claiming the whole of his deposit. It was held that this was a countermand of the cheque, and dispensed with presentment and notice by the holder. But countermand of payment will not, in all cases, excuse presentment. In "Hill v. Heap,"[40] the drawers gave the drawees notice not to pay, and the payees heard of this order, and did not present the bill for payment; but this was held no excuse for not presenting, although it did dispense with the necessity for notice of dishonor to the drawers. "It is always to be presumed until the contrary appears, that the drawer has effects in the drawee's hands and that he will be damnified by an omission to present the bill at the drawee's, and the contrary can be ascertained only by the holder presenting it there and making the inquiry."

Insolvency of acceptor does not excuse presentment.—It is on the principle stated in the last note that the insolvency of the acceptor does not excuse presentment. In a very early case of "Nicholson v. Goutnit,"[41] the Chief Justice said: "It sounds harsh to say that a known bankruptcy should not be equivalent to a demand or notice, but the rule is too strong to be dispensed with." Several cases to the same effect are cited by Judge Chalmers at pages 152 and 153, where he says that in some American states there is a tendency to dispense with the attempt to make presentment when such attempt would

[39] 16 Ont. A. R., 295 (1889).
[40] D. & R., N. P. C., 57.
[41] 2 H. Bl., 609 (1796).

be futile. This tendency is of doubtful expediency, and finds no favour in England.

No presentment necessary to charge acceptor where no place of payment specified.

93. When no place of payment is specified in the bill or acceptance, presentment for payment is not necessary in order to render the acceptor liable.

When place of payment specified, acceptor not discharged by omission to present, but costs of suit in court's discretion.

2. When a place of payment is specified in the bill or acceptance, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures, but if any suit or action be instituted thereon before presentation the costs thereof shall be in the discretion of the court.

Holder must deliver up bill when paid.

3. When a bill is paid the holder shall forthwith deliver it up to the party paying it. 53 V., c. 33, s. 52. [E. s. 52.]

Where no place of payment is specified. Quaere as to disallowance of costs and interest if no presentment or demand before action.—Judge Chalmers suggests that if action were brought without presentation, the court would presumably make the plaintiff pay the costs, and deprive him of interest. The only authority he cites for the suggestion as to costs is the remark of Abbot, C. J., in "Macintosh v. Haydon,"[42] that while it is true in strict law that no demand is necessary against an acceptor, "in practice a demand is usual, and ought to be made before proceedings are instituted; and it might make a material difference in the costs if a solvent acceptor against whom proceedings had been instituted without a demand were promptly to apply to the court." Seeing that it is the duty of the debtor to seek out his creditor, and that this is the reason for the rule that no presentment is necessary, and in view of the fact that express provision is made in this same section in reference to costs, in the particular case of non-presentment there referred to, perhaps less would come of an application to the court than Abbot, C. J., seemed to think likely.

[42] Ry. & M., at 363.

As to the disallowance of interest the case he cites, "Pierce v. Fothergal,"[42] was that of a note payable on demand, where there was no proof of any agreement for interest, and it was held that interest should only be allowed from the issue of the writ of summons. This is no more than saying that a note payable on demand without mention of interest, does not carry interest until there has been a demand. The suit, as was said in one case is a demand,* and the code provides, section 134 b, that interest runs from presentment for payment where the note is payable on demand, which is the same rule that prevailed before the act was passed.[44] It is submitted that this rule has no application to the case where interest is payable by the terms of the instrument, and that the fact of non-presentment should have no effect on the allowance or otherwise of interest.

Where the holder cannot be found, can action be brought against acceptor without presentment?—The reason why no presentment is necessary to charge the acceptor where no place is named is that it is the duty of the debtor to seek his creditor. Suppose he seeks him and cannot find him, and can find no person to whom a payment could be safely made, that is, no person who could give a valid discharge, what must the debtor do? Judge Chalmers refers[45] to a note of Sergeant Manning to the case of "Wilmot v. Williams,"[46] as follows: "Quaere whether in order to maintain an action against an acceptor, where, as often happens, the holder or each of the holders in the case of a bill held by a firm is out of England during the whole of the day on which the bill falls due, it is necessary to prove a demand of payment, either by presentment of the bill or otherwise before action brought." The case is one of hardship if the holder can sue the acceptor without presentment, but it is no harder than any other case in which a debtor is bound to pay money on a day certain, and is unable to find his creditor or any person to whom a lawful tender

[43] 2 *Bing.*, N. C., 167.

* See a criticism of this phrase in *Wheeler v. Warner*, cited in 2 Ames cases, p. 61, n. 2.

[44] See *Chalmers on Bills*, Digest, 167.

[45] *Chalmers on Bills*, 6th Ed., p. 179.

[46] 7 M. & G., 1018.

can be made; and it should be governed by the same principles.

Where place of payment specified, can action be brought against acceptor without presentment, at the risk of costs?—This question is not answered by Mr. Justice Maclaren. With respect to the corresponding section in reference to a promissory note, the Supreme Court of Nova Scotia has decided, in "Warner v. Symon-Kaye Syndicate,"* that presentment is necessary before action is brought, in order to charge the maker. It is difficult to suppose that the legislature meant to make any difference in this regard between the maker of a note payable at a particular place named in the body of the note, and the acceptor of a bill made so payable, either in the body of the bill or by the terms of the acceptance. If the decision of the Nova Scotia Court is correct, it may, however, be held that there is a difference. Some stress was laid on the enactment in section 183 that the note "must be presented for payment" at the place named. There are no such words in the corresponding section as to a bill of exchange. In section 85 it is said that subject to certain provisions a bill must be presented for payment, but the consequence of non-compliance that immediately follows is, that the drawer and indorsers shall be discharged. The case of the acceptor is dealt with in this section, and the apparent intention would seem to be that if the holder fails to present the bill before action, the acceptor shall nevertheless be bound to pay it, as he ought to be; but inasmuch as he should have had it presented, the costs of the unnecessary and strictly speaking premature action shall be in the discretion of the court. Reading the section as a whole, it is difficult to see what the legislature meant if it did not mean this. The suggestion made by the Supreme Court of Nova Scotia, with reference to the corresponding words as to costs, that if the acceptor should succeed for want of presentment, the court may still deprive him of the costs usually given to a successful suitor, is ingenious, but far-fetched. There can be little doubt that this provision was meant to enable the Court to deprive the holder of the costs that he has occasioned by his omission to present the bill.

* 27 N. S., 340 (1894).

It will be seen in commenting on section 183 that in the case of "Merchants' Bank of Canada v. Henderson,"[46a] Armour, J., was of opinion that an action might be brought against the maker without any presentation at the particular place at the risk of plaintiff being obliged to pay the costs of such action in case the maker should show that he had the money at the particular place to answer the note when the note fell due and thereafter.

When address is acceptor for honor, is place where bill protested, bill must be presented to him day following maturity.

94. Where the address of the acceptor for honour of a bill is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity.

Where some other place must be forwarded day following maturity.

2. Where the address of the acceptor for honour is in some place other than the place where it is protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him. 53 V., c. 33, s. 66. [E. s. 67.]

Delay excused by same circumstances as in case of acceptance by drawee.

3. Delay in presentment or non-presentment is excused by any circumstance which would, in the case of acceptance by a drawee, excuse delay in presentment for payment or non-presentment for payment. 53 V., c. 33, s. 66. [E. s. 67.]

Non-business days excluded in computing time for presentment.—Judge Chalmers says[47] that non-business days are to be excluded in computing the time. That is simply that if the day following maturity referred to in the section is a non-business day, the next succeeding business day is the proper one for presentment or forwarding, as the case may be. Judge Chalmers also says that "if the bill be not presented in due time to the acceptor for honour, it is conceived that he, and any party who would have been discharged if he had paid the bill, are discharged by the holder's laches, but there is no

[46a] 28 O. R., 360 (1897.)
[47] *Chalmers on Bills*, 6th Ed., p. 232.

decision in point. He refers to "Story v. Batten," (1830), 3 Wend. N. Y. 486, German Exchange Law, Art. 60, Nouguier, s. 583.

Delay in presentment.—See, ante, sections 91 to 93.

DISHONOUR.

Bill dishonoured. **95. A bill is dishonoured by non-payment.—**

When duly presented and not paid. **(a) when it is duly presented for payment and payment is refused or cannot be obtained; or**

When presentment excused and bill not paid. **(b) when presentment is excused and the bill is overdue and unpaid.**

When bill not paid immediate recourse against drawer acceptor and indorsers. **2. Subject to the provisions of this Act, when a bill is dishonored by non-payment, an immediate right of recourse against the drawer, acceptor and indorsers accrues to the holder.** 53 V., c. 33, s. 47. [E. s. 47.]

Cross references.—As to what is due presentment, see section 86 and following sections.

As to what circumstances will excuse presentment, see sections 89 to 93 inclusive.

Right of recourse distinguished from right of action.—The bill is dishonored if payment is not made on presentation at any suitable hour on the last day of grace, and the holder has an immediate right of recourse against the drawer and indorsers,—and our statute unhappily adds against the acceptor. Notice of dishonor may immediately be given to the drawer and indorsers, but no action can be brought on the bill even against the acceptor, until after the expiration of the last day of grace. As Lindley, L. J., said in "Kennedy v. Thomas,"[48] it certainly seems a little paradoxical that a bill of exchange should be treated as dishonored for one purpose and not for another; but it is clear that when payment of a bill is refused upon its presentation at any time during the day on which it falls due, the holder has

[48] 1894, 2 Q. B., 759.

an immediate right of recourse against the drawer and the indorsers. He can at once give notice of dishonor to the drawer and indorsers, but he cannot commence an action against them any more than against the acceptor before the expiration of the last day of grace." This case overrules the carefully reasoned judgment of Robinson, C. J., in "Sinclair v. Robson," 16 U. C. Q. B., 212. The remarks which follow suggest the inference that the right to protest the bill for non-payment also arises immediately upon the failure to pay on presentation at any reasonable hour on the last day of grace; but the rule as to protest is laid down in section 121, which provides that "every protest for dishonour, either for non-acceptance or non-payment, may be made on the day of such dishonor, and in case of non-acceptance at any time after non-acceptance; and in case of non-payment, at any time after three o'clock in the afternoon." Section 119 enacts further that "subject to the provisions of the act, when a bill is protested the protest must be made or noted on the day of its dishonor." These points will be dealt with more at large under the sections mentioned.

When may action be brought against drawer, acceptor or indorser?—Part of this question has been answered in the last note. The action against the drawer or any indorser cannot be brought immediately, although the statute says that an immediate right of recourse against them accrues. The notice of dishonor is a condition precedent to action against these parties. "As a general rule the holder's right of action against a drawer or indorser dates from the time when notice of dishonour is, or ought to be received, and not from the time when it is sent." This statement from Chalmers is founded on the case of "Castrique v. Bernabo," in which Lord Denman laid down the rule that "where there is a doubt which of two occurrences took place first, the party who is to act on the assumption that they took place in a particular order is to make the inquiry." The plaintiff must, therefore, show that he posted his notice of dishonor in time to have been received in the ordinary routine of the post office before bringing action. Having done this, he is not responsible for casualties in

the post office. See section 104. In the case of "Kennedy v. Thomas,"* Davey, L. J., seems to take for granted that the right of action against the acceptor and against the drawer or indorser must arise at the same time; but he is clearly wrong in this assumption, and his reasoning at page 765 of the case seems quite to overlook the difference between the situations of the parties. The right of action against the acceptor is complete on the expiration of the last day of grace. Against the drawer it may not be complete for some days, or even weeks, if the interpretation is correct which Chalmers puts on the decision in "Castrique v. Bernabo."[49] The rule in Massachusetts is different, and there is much to be said in its favor. See particularly 18 Mass., at pp. 411, 412.

Is the right of action against drawer necessarily complete, even on service of notice of dishonor?—Suppose the bill is dishonored by non-payment at an early hour of the last day of grace, and notice of dishonor immediately served, can the holder sue the drawer or indorser, or must he wait until the expiration of the last day of grace? The reasons that underlie the discussion in "Kennedy v. Thomas,"* referred to in the preceding note, seem to warrant the answer that no action can be brought until the day following the last day of grace.

When bill not paid notice of dishonour must be given. Any drawer or endorser not notified is discharged.

96. Subject to the provisions of this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer, and each endorser, and any drawer or endorser to whom such notice is not given is discharged: Provided that,—

When not accepted and notice of dishonour not given holder in due course not prejudiced.

(a) where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission shall not be prejudiced by the omission;

[49] *Chalmers on Bills*, 6th Ed., pp. 155 and 295.
* 1894 2 Q. B., 759.

Where notice of dishonour by non-acceptance given, notice of subsequent non-payment not necessary unless bill afterwards accepted.

(b) where a bill is dishonoured by non-acceptance, and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted.

Notice of dishonour not necessary to hold acceptor.

2. In order to render the acceptor of a bill liable it is not necessary that notice of dishonour should be given to him.. 53 V., c. 33, ss. 48 and 52. [E. ss. 48 and 52.]

Mere knowledge of dishonor is not sufficient to charge drawer or indorser.—Ordinarily, knowledge of a fact is equivalent to notice of it; but a notice of dishonor implies more than mere knowledge of the fact. It imports the intention on the part of the person notifying, to hold the drawer or indorser responsible, and, although this may be inferred where the knowledge of the fact is communicated by one entitled to call for the payment, it has been determined by more than one decided case, that the knowledge alone of the fact is not equivalent to notice.[50]

To whom notice of dishonor must be given. Guarantors and warrantors.—The section expressly provides that notice to the acceptor is not necessary, and this is true also of the maker of a promissory note. Persons who stand in a relation analogous to that of an indorser, are not entitled to notice of dishonor in the strict sense of the term, for example, a guarantor of the bill, or for any of the parties to the bill. His position is that of a surety, and his rights and obligations are determined by the law of principal and surety. The position, rights and duties of such a party will be further considered in commenting on section 131, which provides that where a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liability of an indorser to a holder in due course, and is subject to all the provisions of the act respecting indorsers. See also the notes that immediately follow.

[50] See *Chalmers on Bills*, 6th Ed., 157, and cases cited.

Guarantor of price of goods sold to acceptor or drawer of bill.—Mr. Justice Maclaren says: "It has been laid down that the person who gives a guarantee for the price of goods to be supplied to the acceptor of a bill or the maker of a note, is not entitled to notice of dishonor; while if the goods are for the drawer of the bill he is entitled to notice."[51] It is not explained why there should be this difference. In neither case is the guarantor a party to the instrument. In both his position is that of a surety. In neither case should his position call for a compliance with the strict rules that have been laid down for fixing the liability of the parties liable on the instrument, and in both cases the claimant should perform the duties incumbent on him in order to hold the surety liable. In the latest of the cases cited by the author, "Carter v. White,"[52] Cotton, L. J., states the principle quite generally that the rule as to notice of dishonor applies only to parties to bills of exchange, not to persons who are interested in them without being parties. If any authority is required, we have the case of "Hitchcock v. Humphrey,"[53] referred to by Lord Justice Lindley, where it was expressly decided that the surety for payment of a bill is not discharged, although he has received no notice of the dishonor of the bill. The same thing was laid down in "Black v. Ottoman bank."[54] It was there said: "The cases referred to upon bills turn upon a different principle, viz.: that by mercantile usage a contract is implied by the holder to give notice of dishonor within a certain time to the drawer or indorser, who stands in the situation of surety for the acceptor." Depending on the light of nature, one would say that if the party guaranteeing the bill was not entitled to notice of dishonor, a fortiori, one who only guaranteed the payment of the price of goods supplied to the drawer of the bill would not be entitled to such notice. But Judge Chalmers, whose lead is followed by Mr. Justice Maclaren, seems to draw a distinction between the guarantor for the price of goods sold to the acceptor, who, he says, is not entitled to notice of dis-

[51] *Maclaren on Bills*, 3rd Ed., p. 282.
[52] 25 C. D., 666.
[53] 15 M. & G., 559.
[54] 5 *Moore*, P. C., 572, 484.

honor, and the guarantor for the price of goods sold to the drawer, who is entitled to notice. "Holburn v. Wilkins,"[55] is cited as authority for the proposition as to the acceptor and "Phillips v. Astling,"[56] as authority for the statement as to the drawer. No such distinction as that between goods supplied to the drawer and goods supplied to the acceptor is suggested by the cases. The case as to the acceptor occurred in 1822, and that as to the drawer in 1809, and the later case was distinguished from the earlier one on the ground that in "Phillips v. Astling," where the guarantor was held entitled to notice, the insolvency of the parties to the bill did not occur till after the bill became due, while in the later case the defendant, guarantor, had notice more than a month before the bill was due that the acceptors were insolvent, and that the plaintiff would look to him for payment. Bayley, J., added that "here the defendant was not a party to the bill; the case of 'Swinyard v. Bowes,' 5 M. & S. 62, is therefore precisely in point against him."

Before referring to the case mentioned by Bayley, J., it is necessary to examine the case of "Phillips v. Astling, et al,"[57] In a previous case of "Warrington v. Furbor,"[58] the question had arisen as to the position of a guarantor for the acceptor who had become insolvent, and Lord Ellenborough had said that the same strictness of proof was not necessary to charge the guarantees as would have been necessary to support an action upon the bill itself, where, by the law merchant, a demand upon and refusal by the acceptors must have been proved in order to charge any other party upon the bill, and this notwithstanding the bankruptcy of the acceptors. "But this," he said, "is not necessary to charge guarantees, who insure, as it were, the solvency of their principals, and therefore if the latter become bankrupt and notoriously insolvent it is the same as if they were dead, and it is nugatory to go through the ceremony of making a demand upon them." Lawrence, J., added that "though proof of a demand on the accept-

[55] 1 B. & C., 101.
[56] 2 *Taunt.*, 206.
[57] 2 *Taunt.*, 206.
[58] 8 *East.*, 242.

ors who had become bankrupts was not necessary to charge the guarantees, yet the latter were not prevented from showing that they ought not to have been called upon at all, for that the principal debtors could have paid the bill if demanded of them." Now the case of "Philips v. Astling," which is the only authority cited for the proposition that notice of dishonor is necessary to charge a guarantor for the price of goods sold to the drawer, fully recognizes the authority of this case, and the distinction between the position of a guarantor and one who is a party to the note. Lord Mansfield speaks of the necessity of due notice being given to the guarantor, but clearly recognizes that it is not the same sort of notice that would be requisite in order to charge an indorser. The case was one of guarantee of a bill, and the bankruptcy of the parties liable on the bill did not occur until long after the bill became due. "For anything, then, that appears, if this gentleman had demanded the money either of the acceptor or drawer, the bill might have been paid. . . and although that case" ('Warrington v. Furber') "has relaxed the strictness of the proof of presentment and notice, and seems to decide that it is not necessary to pursue the same strictness in order to charge a guarantee as to charge the drawer of the bill, yet it may still be inferred from it that if the necessary steps are not taken to obtain payment from the parties who are liable on the bill and solvent, the guarantee must be discharged."

It is submitted, therefore, that there is no distinction between the position of a guarantor of the bill and the guarantor for payment of the goods supplied to parties to the bill, nor as to the latter, between the case of goods supplied to the drawer and goods supplied to the acceptor. The guarantor is a surety. Not being a party to the bill he is not entitled to the strict notice of dishonor required in order to charge a party secondarily liable on the bill: but, being a surety only, he may be discharged by the failure to take the proper steps to recover from the parties for whom he is surety and to give him timely notice of their default in order that he may protect himself.

Notice of dishonor to others than parties further considered.—The case of the guarantor ahs been dealt with. Other cases may arise, and some there have been in which it has undoubtedly been held that persons have been entitled to notice of dishonor in the strict mercantile sense of the term who were not parties to the instrument. The wisest things that have been said on this difficult class of cases are found in the judgment of Abbot, C. J., in "Van Wart v. Nobley et al."[59] In that case parties in America had employed a broker in Birmingham to purchase goods for them, and sent him a bill drawn by American parties on persons in London, but did not endorse the bill. The bankers in whose hands the broker placed the bill for collection neglected their duties, and the broker sued them for damages. It was held that the parties who had employed the broker, not having indorsed the bill, were not entitled to notice of dishonor, and therefore the broker could still look to them for the price of the goods sent to them. Lord Tenterden, giving judgment, said: "The decisions that have taken place in actions brought against a guarantee, warrant the proposition . . . that the nature of the transaction, and the circumstances of the particular case are to be considered and regarded. Thus, in 'Warrington and another v. Furber,' 8 East, 242, where a commission of bankrupt had issued against the acceptor before the bill became due, a presentment to him was held unnecessary to charge the guarantee. 'Philips v. Astling,' 2 Taunt. 206, stood upon different grounds; the bill was not presented for payment when it became due, as it ought to have been; two days afterwards notice that it remained unpaid was given to the drawers, for whom the defendant was guarantee, but no notice was then given to the defendant. The drawers and acceptors continued solvent for many months after the bill was dishonored, and it was not until they had become bankrupts that payment was demanded of the defendant. Under these circumstances, because the necessary steps were not taken to obtain payment from the parties to the bill while they continued solvent, the Court of Common Pleas held the guarantee to be dis-

[59] 3 B. & C., 439 (1824).

charged. In "Holbrow v. Wilkins," 1 B. & C. 10, the acceptors were known to be insolvent before the bill fell due, and some days after that fact was known to the plaintiffs, wrote to the defendant and desired him to accept a new bill, which he refused. The bill was not presented for payment when due, nor any notice of the non-payment given to the defendant. The bill would not have been paid if presented, and it did not appear that the defendant sustained any damage by reason of the want of presentment or notice, and this court held the guarantee not to be discharged. These decisions show that cases of this kind depend upon the circumstances peculiar to each."

Person not party to the bill held entitled to notice of dishonor.—The remarks of Lord Tenterden in the last note, are applicable to the case of "Smith et al. v. Mercer et al."[60] The plaintiffs sold to the defendants, goods to be paid for according to the contract between the parties by cash or "approved bankers' bills." The defendants paid for them by an "approved bankers' bill," which was dishonored on presentment for acceptance. They were not parties to the bill, and received no notice of dishonor. In an action against them for the price of the goods, it was held, according to the headnote, that the defendant's liability was not more extensive than it would have been if they had indorsed the bill, and that they were, therefore, discharged, not having received notice of dishonor. Kelly, C. B., said: "The holders of the bill were bound to give notice of dishonor to all parties to it, and this appears to have been done; but in this action they are seeking a remedy against the defendants, who were not parties to it, and who had had no notice of dishonor. This directly raises the question whether, under such circumstances, recourse can be had to the defendant . . I think their right to proceed against the defendant was conditional on their giving the defendants notice of dishonor of the bill." Bramwell, B., thought that the plaintiffs, if they had chosen to do so, might have insisted on the defendants indorsing the bill. They did not do so, but the defendants' liability continued just as

[60] L. R., 3 Ex., 51.

though they had. They were liable in the same manner and with the same incidents as if they had been called on, as they might have been, to indorse the bill. But they were not liable otherwise, and therefore not liable without a notice of dishonor being given to them." The reporter notes that the case of "Swinyard v. Bowes," 5 M. & S. 62, above referred to at length, was not cited during the argument, but adds: "It may, however, be remarked that in that case there was no pre-appointed mode of payment. The reporter also refers to the case of "VanWart v. Wooley," above commented on, and apparently questions the soundness of the judgment.

Notice of dishonour to surety by bond for payment by acceptor or drawer.—In "Murray v. Key,[61] a bond was given by defendant, conditioned that the defendant or the drawer of a bill, who was also on the bond, would pay a bill delivered to the plaintiff, if it was not paid by the acceptor. Abbot, C. J., emphasized the point that the parties to the bond were also parties to the bill. They would not have been liable on the bill without notice of dishonor, and he concluded that the object of the bond was to make them liable at all events as sureties for the acceptor in case he did not pay it. Bayley, J., put his judgment on the clear ground that the bond was conditioned for their own acts in case of a given event, namely the non-payment by the acceptor. The acceptor had not paid, nor had the bondsmen done so. The bond was therefore forfeited unless the neglect to present the bill to the acceptor and the want of notice to the other parties were equivalent to payment. He thought this was not the intention of the bond, one object of which might be to exonerate the plaintiff from the risk that laches on the part of the holder, the very thing that had in fact happened, might discharge the defendants from their liability on the bill.

Notice of dishonor to be given.

97. Notice of dishonour in order to be valid and effectual must be given,—

Not later than next juridical day following dishonor.

(a) not later than the juridical or business day next following the dishonour of the bill;

[61] 5 B. & Ad., 165.

By or on behalf of holder or of indorser liable on the bill.

(b) by or on behalf of the holder, or by or on behalf of an endorser, who at the time of giving it, is himself liable on the bill;

In case of death of drawer or endorser, if known, then to personal representative.

(c) in the case of the death, if known to the party giving notice, of the drawer, or endorser, to a personal representative, if such there is, and with the exercise of reasonable diligence he can be found;

To each endorser unless partners or one has authority for others.

(d) in case of two or more drawers or endorsers who are not partners, to each of them, unless one of them has authority to receive notice for the others. 53 V., c. 33, s. 49. Cf. E. s. 49 (1), (9), (11), (12).

Notice may be given.

98. Notice of dishonour may be given,—

As soon as bill dishonoured.

(a) as soon as the bill is dishonoured;

To the party or agent.

(b) to the party to whom the same is required to be given, or to his agent in that behalf;

By agent in his own name or name of party entitled to give notice.

(c) by an agent either in his own name or in the name of any party entitled to give notice whether that party is his principal or not;

In writing or personal communication identifying bill and intimating dishonour.

(d) in writing or by personal communication and in any terms which identify the bill and intimate that the bill has been dishonoured by non-acceptance or non-payment.

Misdescription does not vitiate.

(2) A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby. 53 V., c. 33, s. 49.

99. In point of form,—

Return of bill sufficient notice.

(a) the return of a dishonoured bill to the drawer is a sufficient notice of dishonour;

Written notice need not be signed.

(b) a written notice need not be signed.

Insufficient writing validated by verbal communication.

2. An insufficient written notice may be supplemented and validated by verbal communication. 53 V., c. 33, s. 49. E. s. 49 (2), (5), (7), (8), (12).

When notice of dishonor may and must be given.—It may be given as soon as the bill is dishonored, and this, we have learned, is when payment has been refused on presentation at any reasonable hour on the last day of grace. It must be given not later than the juridical or business day, (see section 2 [2]) next following the dishonor of the bill. These statements refer to the notice to be given by or on behalf of the holder of the bill, who may give notice to all the parties liable to him on the bill if he choose; but may also, if he choose, give notice to only some of them, or to the party immediately antecedent to him, who is allowed the same time for giving notice to parties antecedent to him that the holder had for notifying him.

Notice by or on behalf of the holder.—The notice may be given by the bank with which the note is left for collection, or by any other person authorized to receive payment.[62] A notice was given by a person who had been employed by the original parties to get the bill discounted, but who, at the time of giving the notice, had no authority in the matter from the holders of the bill, and in reality was a mere stranger. "The notice," said Lord Ellenborough,[63] "must come from the person who can give the drawer or indorser his immediate remedy on the bill; otherwise it is a mere historical fact. In this case, Cutler" (who gave the notice) "was not possessed of the bill and had no control over it."

While the notice must be given by or on behalf of the holder, etc., it is not required that it shall say on whose behalf it is given, although this is of course desirable and proper. In "Woodthorpe v. Lavers,"[64] the indorsee left the bill at the office of an attorney to be presented by him. It was dishonored and the attorney sent a notice of the dishonor, not saying on whose behalf he sent it. The bill was indorsed in blank, and was in the hands of the attorney, so that Parke, B., said in the course of the argument that the attorney was the holder. But the case is treated by Maclaren as authority for the more general proposition that "a notice by an attor-

[62] *Rowe v. Tupper*, 13 C. B., 249.
[63] *Stewart v. Kenneth*, 2 Camp., 177.
[64] 2 M. & W., 109.

ney is sufficient, although he does not say for whom he is acting."[65]

Holder may avail himself of notice by any party.—"Since the case of 'Chapman v. Keane,' 3 Ad. & E. 193, it must be considered perfectly settled that a notice of dishonor need not be given by the holder, but that he may avail himself of notice given in due time by any party to the bill." Per Parke, B., in "Harrison v. Roscoe," 15 M. & W. 234. See further comments under section 103.

Where the holder has died.—The proper person to give the notice in such a case, is his personal representative, who has a reasonable time, after becoming such, to ascertain the facts and give the requisite notice.[66]

Notice by or on behalf of indorser.—This topic is discussed by Parke B., in "Harrison v. Roscoe,"[67] where Mr. Justice Story's statement of the rule is referred to, that notice will be sufficient if it comes from some person who holds the bill when it is dishonored, or is a party to the bill, or who would, on the same being returned to him and after payment, be entitled to require reimbursement thereof. "The notice," says Parke, B., in this case, "by the terms of the rule as laid down by the Court of Queen's Bench, must be given in due time by the party to the bill, that is, in due time if he himself were suing; and consequently the case of notice by a party who had himself been already discharged by the laches of the holder, is excluded." This is involved in the terms of the section. The notice is to be given by or on behalf of the holder, or by or on behalf of an indorser, "who at the time of giving it, is himself liable on the bill." If he has been already discharged by the laches of the holder of the bill, he is not entitled to give notice, and the notice that he gives will not be available against the party to whom it is given. "Turner v. Leech."[68]

[65] *Maclaren on Bills*, 3rd Ed., p. 202, Illustration 5.
[66] *White v. Stoddard*, 11 Gray (Mass.), 258.
[67] 15 M. & W., 234.
[68] 4 B. & Ald., 451.

Notice by the acceptor or drawee.—The rule stated above that the notice must be by some person who, on paying the bill, would be entitled to require reimbursement, "excludes," as Parke, B., says in the case above cited of 'Harrison v. Roscoe,'[69] "the acceptor, who never could himself sue upon the bill after taking it up, and the instances in which a notice by an acceptor has been held good at 'nisi prius' are explained by Mr. Justice Bayley, on the supposition that in these the acceptor had a special authority to do so."

Notice in case drawer or indorser is dead.—Mr. Justice Maclaren points out[70] that a notice posted is not under section 103 invalid by reason that the party to whom it is addressed is dead. But he suggests that as the clause 97 (c) is imperative, where the death is known and a representative can be found, the section as to posting will be limited to the cases where the party giving notice does not know of the death, or cannot find such representative. Judge Chalmers considers this clause 97 (c) declaratory, although there was no English decision in point.

The illustrations given under this clause by Mr. Justice Maclaren do not seem to be consistent.* "A notice of non-payment merely to the executrix or executor of the late Mr. Jones, Toronto, is bad," but "where an indorser has recently died and no administrator or executor can be found, a notice addressed to the legal representative of deceased is sufficient." The latter is a case from Tennessee. The former is an Upper Canadian case, and was put upon the very reasonable ground by Robinson, C. J., that "the court was not at liberty to assume that the postmaster would take the trouble to enquire who were the executor and executrix of Mr. Jones, or that the matter was so public and notorious that the letter was sure to reach the proper party without delay." "Bank of B. N. A. v. Jones."[71] Where, on the other hand, notices were addressed to the "Administrators of William Stimson's estate, Belleville, Ontario,"

[69] 15 M. & W., 234.
[70] *Maclaren on Bills*, 3rd Ed., 267.
* *Maclaren on Bills*, 3rd Ed., p. 268.
[71] 8 U. C. Q. B., 99.

and others similarly addressed to "Canifton," the latter having been the place of testator's residence, and one of the executors stated he had received two notices, one several weeks after the maturity of the note from testator's widow, who got it at Canifton, the other from his co-executor, but whether a day or a fortnight after protest he could not say, while his co-executor showed that he had never received any notice at all, but was shown one by the other as having been received by him; it was held that the reasonable inference to be drawn from the evidence was that the notice had been received in due course.*

In "Merchants' Bank v. Bell,"[72] the indorser was a married woman who died intestate during the currency of the note, and the notice of protest was sent to her surviving husband, addressed, "James Bell, executor of the last will of M. A. Bell, Perth," and was received by the husband, who resided with his children in the house which the deceased wife had occupied. No letters of administration had been granted. Having regard to all the circumstances, and in the absence of any clearly defined procedure, Chancellor Boyd thought no injustice was done by holding that the bank had done all that reasonably devolved upon them in order to fix with liability the separate estate of the deceased.

Mr. Justice Maclaren cites American authority to the effect that a notice addressed to one of several executors or administrators is sufficient. "Beals v. Peck."[73]

Notice to the agent of drawer or indorser.—The agent to whom notice is permitted to be given must be the agent in that behalf. As Mr. Justice Maclaren says, delivery of notice to a man cutting wood in the indorser's yard is insufficient, there being no evidence that the man was a member of the family, or that the indorser received the notice. "Commercial Bank v. Weller."[74] This is a very clear case. It is not so clear that the notice so given would have been sufficient even if the party so notified had been a member of the family. But it was held in

[72] 29 *Grant*, 413.
[73] 12 Barb., 245.
[74] 5 U. C. Q. B., 543.
* *McKenzie v. Northup, et al.*, 22 U. C. C. P., 383.

"Housego v. Cowie,"[75] that a verbal notice of dishonour given to the drawer's wife at his house was sufficient, Lord Abinger, C. B., saying that the wife would be as likely to deliver a verbal message as a written one; Parke, B., that the sending of a verbal notice to a merchant's counting house during the hours of business is sufficient, though no one is there, and Bolland, B., in reply to an "interruption" by counsel in the course of the argument to the effect that it is assumed, in the case mentioned by Parke, B., that the merchant undertakes to have someone there during those hours, said: "So a person not a merchant who draws a bill of exchange, undertakes to have someone at his house to answer any application that may be made respecting it when it may become due."

With this case may well be compared the Canadian case of "Counsell v. Livingston,"[76] in which the husband was, under the circumstances, held to be the agent for his wife, who, as well as himself, was an indorser, and a letter to him was held to be notice to both. There were in this case special circumstances which the Court of Appeal regarded as sufficient to establish the agency of the husband for his wife for the purpose of receiving the notice of dishonour of the note. See as to form of the notice the next following note.

A written notice left at the house, is, of course, a good notice of dishonour, and it was held that where the indorser went to fill an office temporarily, but had left his family in his old home, a notice left there was sufficient. "Ryan v. Malo."[77] Verbal notice to the attorney of a bankrupt indorser was said, in "Crosse v. Smith,"[78] by Lord Ellenborough, to be of no service in helping the notice of dishonour, and it would apparently be no better in writing, because the ground on which Lord Ellenborough ruled the point was that the attorney was not the proper person to give the notice to. On the other hand, in "Allen v. Edmundson,"[79] in which the holder had gone to the counting house of the drawer

[75] 2 M. & W., 349.
[76] 4 O. L. R., 340.
[77] 12 L. C. R., 8.
[78] 1 M. & S. at 554.
[79] 2 Ex. at 723.

during business hours, and, finding it shut, had knocked at the door, and no one answering, had come away without leaving any notice, Parke, B., said that if the plaintiff had found a person there and delivered a verbal notice, that would have been enough, although this is a little qualified by the remarks that follow, to the effect that it might depend on whether such person were merely a boy, or a clerk who kept the books.

Mr. Justice Maclaren says, citing "Firth v. Thrush,"[80] that notice to the person who has indorsed the bill under a power of attorney is probably good notice to the indorser, but notice to a referee in case of need indicated by an indorser is not sufficient to bind the latter citing, "ex parte Prange."[81]

A case is also cited by Maclaren from the United States, "Bank of N. S. v. Patch,"[82] to the effect that where a party has no office and boards at a private boarding-house, a notice left there with a fellow-boarder in his absence is sufficient. It is difficult to see how the fellow-boarder can be an agent of the party to receive a notice of dishonor, and it is submitted that this ruling must be taken with a grain of salt. Perhaps the distinction has not been drawn which Parke, B., emphasizes in the case cited above of "Allen v. Edmundson," between the sufficiency of the notice and validity of the excuse for not giving the notice.

Form and contents of notice.—Judge Chalmers says that "notices of dishonour are now construed very liberally. In 1834, the House of Lords in 'Solarte v. Palmer,'* decided that the notice must inform the holder, either in terms or by necessary implication, that the bill had been presented and dishonored. This inconvenient decision was frequently regretted and was eventually got rid of by considering it merely as a finding on the particular facts. Since 1841 it does not appear that any written notice of dishonor has been held bad on the ground of insufficiency in form."

[80] 8 B. & C. at 391.
[81] L. R. 1 Eq. at 5.
[82] 6 Pet., U. S., 250.
* 1 Bing., N. C. 194.

Illustrations are hardly necessary where the terms of the statute are so plain and full. One of those given by Maclaren is important because it seems to require less than is mentioned as the proper contents of a notice of dishonor. In "Blain v. Oliphant," 9 U. C. Q. B., 473, it was held that a notice to an indorser stating that the note was duly protested for non-payment was sufficient without saying that it was presented. The words of the statute suggest that the notice must intimate that the bill has been dishonored by non-acceptance or non-payment. The statement of fact that the bill had been protested would, however, no doubt be held to import that it had been dishonored, although not a direct statement that it had been.

In the case referred to in last note of "Counsell v. Livingston," 4 O. L. R., 340, the notice was in a letter to the husband, who and his wife were both indorsers, saying: "I beg to advise you that Mr. ——'s note for $3,500 in your favour, and indorsed by yourself and wife and held by our estate, was due yesterday. As I have not received renewal, will you kindly see that the same is forwarded with cheque for discount as there is no surplus on hand." This was held a sufficient notice of dishonor, and as above stated, was a notice to both the indorsers under the special circumstances of the case.

In a case before the act, "Handyside v. Courtney," 1 L. C. J., 250, it was held that a notice giving other particulars of the note but not mentioning the amount was sufficient where there was no evidence of the existence of another note, and it has been held that if there be more than one bill to which the notice may refer, the onus is on the defendant to prove this fact. "Shelton v. Brathwaite."[83]

It seems to have been decided in several cases noted up by Maclaren that where the notice of dishonor of a foreign bill does not state that it has been protested, the indorser will not be liable; but in the latest case he cites, ex parte Lowenthal, 9 Ch. 951, Sir Wm. James ruled that the notice was good without making any reference to the protest. There had also been an admission of liability, so that the opinion may probably be regarded as "obiter

[83] 7 M. & W., 436.

dictum," but Chalmers and Maclaren both treat the case as authority for the proposition, and as overruling the earlier authorities.

The issue and service of a writ of summons, although the writ was served on the indorser on the same day that the note was dishonored, was held in Manitoba not to be a sufficient notice of dishonor. A contention to the contrary was made in "Commercial Bank v. Allan,"[84] but Bain, J., speaking for himself as well as Taylor, C. J., and Killam, J., said he was satisfied that the writ of summons could not be relied on in the action in which it was issued as notice of the dishonor of the bill or note sued on, and that he had never before heard it even suggested that it could be.

Could a writ of summons in discontinued action serve as notice of dishonour?—Suppose the suit referred to in the preceding note had been discontinued and a subsequent suit brought on the same note, could the first writ if containing everything required in a notice be used as a notice of dishonor? The case does not decide that it could not be, and in jurisdictions in which non-suits are permitted, there is no reason why a writ of summons such as described in the abortive action could not be made to serve the purposes of a notice of dishonor in the second action.

Unsigned written notice.—In "Maxwell v. Brain,"[85] a notice of dishonor was sent with a lithographed heading of the address and style of the bank, thus: "National and Provincial Bank of England, Hereford, 30th July, 1863," but not signed by any person nor naming the senders of the notice in the body of the notice, or otherwise than in the heading referred to. It was held that this was a good notice of dishonor. Pollock, C. B., said: "I think the notice, professing as it does to come from the National and Provincial Bank of England at Hereford, which was the proper quarter for it to come from, is quite sufficient. . . . If it had been signed, it would not have

[84] 10 Manitoba, 330 (1894).
[85] 10 L. T., N. S., 307 (1864).

given any further information to the defendant. . . . The signature of an unknown clerk would have given no further information to the defendant, and the absence of such signature cannot therefore make any difference. Notwithstanding the American authoriti s referred to in Mr. Justice Byle's book, I think the notice was sufficient, etc."

Is notice by telegraph good?—Sir John Paget, in one of the Gilbart lectures, thus deals with this question, after quoting section 49 (1) of the English act, corresponding to section 97 of the present Canadian act:

"It is not a very easy question. The act does not seem to contemplate a telegram by the way; it goes on talking of post, addressing, posting, miscarriage of the post-office, and so forth. But if it comes within the terms of the act it would be good.

"The writing which leaves the sender's hands is not the writing which reaches the receiver's hands. It is not even on the same coloured paper. But I do not think that is essential. It is obvious it need not be in his handwriting, as it may be in print. The act uses the word "given," which seems to point to the sufficiency of its being in writing when it reaches the receiver. It may be given by or on behalf of the holder or endorser. So you may clearly employ an agent or a series of agents. It must be everyday practice to telegraph to your agent in another place to give notice of dishonour, and he might do so in writing. Finally, Chief Justice Bovill once held that a mere telegram, written out and signed by the telegraph clerk at the far end, in the name of the sender, would be a sufficient memorandum signed by the sender or his agent duly authorized in that behalf to satisfy the Statute of Frauds. And if it satisfies the Statute of Frauds, it must certainly satisfy the Bills of Exchange Act and us.

"So I think telegraphic notice of dishonour is unquestionably good. I take it the whole chain of the young lady at the counter, who takes it in if she has nothing better to do, the transmitting clerks at each end, and the telegraph boy who takes it out at the far end, are all acting as agents for the sender, or on his behalf."

Agent may give notice of dishonour of bill in his hands to principal who will have same time as independent holder for notifying others.

100. Where a bill when dishonoured is in the hands of an agent he may himself give notice to the parties liable on the bill or he may give notice to his principal, in which case the principal upon receipt of the notice shall have the same time for giving notice as if the agent had been an independent holder.

Agent must give notice within same time as an independent holder.

2. If the agent gives notice to his principal he must do so within the same time as if he were an independent holder. 53 V., c. 33, s. 49. [Cf. E. s. 49 (13).]

Party receiving notice has same time as holder to notify antecedent parties.

101. Where a party to a bill receives due notice of dishonour he has, after the receipt of such notice the same period of time for giving notice to antecedent parties that a holder has after dishonour. 53 V., c. 33, s. 49. [E. s. 49 (14).]

Illustrations of the working of these sections.—Chalmers gives several illustrations of the working of these sections which appear to be declaratory of the practice sanctioned by the court before the act was passed. "C. indorses a bill to the Liverpool branch of the D. Bank. The Liverpool branch sends it to the Manchester branch, and the Manchester branch indorses it to the head office in London, who present it for payment. The head office sends notice of dishonour to the Manchester branch, the Manchester branch sends notice to the Liverpool branch, who gives notice to C. Each branch, as regards time, is to be considered a distinct party." In the case here put, each of the indorsers is considered as if a distinct party for this purpose, and has the same period of time for giving notice to antecedent parties that a holder has after dishonour. This period is defined by section 103. That is to say, the notice may be deposited in the post office with the postage paid at any time during the day on which presentment is made or the next following juridical or business day. As applied to the case of the party antecedent to the holder, this must be interpreted to mean that he can deposit his notice of dishonour in the post office on the day he

receives the notice of dishonour or at any time during the next following juridical or business day. It may happen in this way that where there are many indorsers the last of them will not get notice of dishonour until long after the bill has in fact been dishonoured, and it would be plausible to say that so long as he received his notice of dishonour as early as he would receive it if this course of successive notifications from each party to the party next antecedent were pursued, he could not take advantage of any neglect on the part of any intermediate party. But this is not the law, as will be seen from the next following note.

Indorser discharged by laches of subsequent indorser. —In " Turner v. Leech,"[86] the defendant was the eighth and plaintiff the eleventh indorser of a bill which was indorsed by him to Bennett, by Bennett to Fletcher, and by Fletcher to Horden & Co., bankers, at Wolverhampton, who transmitted the bill to their London correspondents, Samson & Co. Notices of dishonour were duly sent from party to party, till Bennett got his notice on September 4th. He should have notified the plaintiff on the 5th, but did not do so until the 8th. The plaintiff nevertheless paid the bill and sought to recover from the defendant as a prior endorser. It was held that the plaintiff had been discharged by the laches of Bennett in not giving him notice, and had paid the bill in his own wrong, and that defendant could not be charged on the bill, although it appeared that the defendant, in case successive notices had been given by all the parties on the bill, could not have received notice of dishonour at an earlier period.

The operation of the rule is further illustrated by " Rowe v. Tipper,"[87] where " A bill indorsed by A. to B. and by B. to C., became due on Saturday, the 15th November, and was presented and dishonoured. C. gave notice to B. on Monday, the 17th, and to A. on the following day. Had B. given notice to A. on that following day, everything would have been in order and C. could have maintained his action against A. by virtue of the

[86] 4 B. & Ald. 451 (1821).
[87] 13 C. B., 249 (1853).

principle embodied in section 102 to be presently considered. The notice so given by B. would have enured to the benefit of C., but he could not take anything by his own notice because it was not given within the period allowed, although it was received by A. as soon as a notice in due course from B. would have been received. Maule, J., said ,in the course of the argument, "the rule is that each has a day, not that the holder has a day for each indorser." The rule laid down in Chitty & Hulme on Bills was practically endorsed by Jervis, C. J., That rule is set forth in the argument in the following terms: "The holder must, in order to subject all the parties to actions at his suit, give or forward all his notices to every one of the indorsers and to the drawer whose residences he can ascertain, on the day after the bill or note was dishonored, and if he omit to give or forward such direct and distinct notice to each, he may be deprived of all remedy against the omitted party, unless some other party to the bill has given him notice of dishonor in due time, in which case the latter notice will enure to the benefit of the holder. * * * But if any one party miss a day in duly giving or forwarding notice without legal excuse a link in the chain of regular notice is broken and all the other parties are prima facie discharged from liability to be sued. So if there are several indorsers of a bill and the last indorsee and holder resorts in the first instance to the first of such indorsers he is not entitled to as many days as there are indorsers to give notice of dishonor to him, but must give it in the same time as he would have been obliged to have done if he had resorted to his first immediate indorser."

Evidence for plaintiff need not exclude the possibility of laches.—A bill was drawn in St. John, New Brunswick, payable in London. The holder sent notice of dishonour to the plaintiffs at Wolverhampton, by whom notice of dishonour was sent to the drawer at St. John. The bill was dishonoured in London on October 16th, and a mail left England on October 19th, but the notice of dishonour was not sent until the mail packet of November 4th. It appeared, however, that October 16th was Saturday, and therefore the London bankers who held the bill were not

bound to send notice until the 18th, and the plaintiffs at Wolverhampton might not have received it until the 19th. It was held that, although the holder might have been guilty of laches which would discharge the defendant, the plaintiff was not bound to make out a case which would exclude the possibility of such laches. The notice had been received by the defendant as soon as he would be entitled to receive it, assuming notice to have been duly given by the holder in London to the plaintiffs at Wolverhampton, and by the latter to the defendant.

Notice of dishonour given on behalf of holder enures for benefit of all subsequent holders and all prior indorsers having recourse against party notified.

102. A notice of dishonour enures for the benefit,—

(a) of all subsequent holders and of all prior endorsers who have a right of recourse against the party to whom it is given, where given on behalf of the holder;

Given by or on behalf of endorser enures to benefit of holder and all endorsers subsequent to party notified.

(b) of the holder and of all endorsers subsequent to the party to whom notice is given where given, by or on behalf of an endorser entitled under this Part to give notice. 53 V., c. 33, s. 49. [E. s. 49 (3), (4).]

Form of statement in previous act.—The meaning of these sub-sections was more easily caught as expressed in the statute of 1890, as follows:—

"Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders, and all prior indorsers who have a right of recourse against the party to whom it is given.

"Where notice is given on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given.

Notice by indorser must be by one liable on the bill.—A previous section (97b) provides that notice of dishonour may be given by the holder or by or on behalf of an indorser, who, at the time of giving it, is himself

liable on the bill. It is only a notice so given that enures to the benefit of the holder or of other indorsers. If the indorser has been himself discharged by the laches of a subsequent party he can give no notice of dishonour that will enure to the benefit of other parties.

Notice sufficient to customary address or place of residence or place at which bill is dated, unless party has designated another place authenticated by his signature.

103. Notice of the dishonour of any bill payable in Canada shall, notwithstanding anything in this Act contained be sufficiently given if it is addressed in due time to any party to such bill entitled to such notice, at his customary address or place of residence or at the place at which such bill is dated, unless any such party has, under his signature, designated another place, in which case such notice shall be sufficiently given if addressed to him in due time at such other place.

Such notice sufficient although residence differs from place to which notice is sent. Deposit of notice in Post Office postage paid any time on day of dishonour or next juridical day sufficient.

(2) Such notice so addressed shall be sufficient, although the place of residence of such party is other than either of the places aforesaid, and shall be deemed to have been duly served and given for all purposes if it is deposited in any post office, with the postage paid thereon, at any time during the day on which such presentment has been made, or on the next following juridical or business day.

Good even if party to whom addressed is dead.

(3) Such notice shall not be invalid by reason only of the fact that the party to whom it is addressed is dead. 53 V., c. 33, s. 49.

Sufficiency of address.—In an early Upper Canada case the notice of dishonour was addressed to the indorser at "York Township."* This was held sufficient in the absence of any evidence as to whether there were one or more post offices in the township, and, there being no proof that a letter for any other purpose would have been usually addressed to him in any other manner, or ought in the common course of things to have been directed to any certain post office in the township or any other township near him. But it is said to have been held in

* *Bank of U. C. v. Bloor*, 5 U. C. Q. B., 619.

a New Brunswick case that a notice put in the post office at Saint John and addressed, "Mr. D. D. (the defendant), near Blake's Mills, Nashwaak," was not sufficient without proof that a letter thus directed would probably reach the defendant in due course through the medium of the post office.* The case as stated would be clearly in conflict with the earlier one, but the statement of the case is defective. It was proved that the defendant did not live at the place named, but near Fredericton, and the rule upon the subject was stated to have been thus laid down by Abbott, C. J., in "Walter v. Haynes," "Where a letter fully and particularly directed to a person at his usual place of residence is proved to have been put into the post office, this is equivalent to proof of a delivery into the hands of that person; because it is a safe and reasonable presumption that it reaches its destination." In the case cited by the New Brunswick court of "Walter v. Haynes," Ry. & M., 149, it was held that to address a letter to a person in a large town without any addition to the name of the person or of the town, may be invalid, and a letter addressed to W. Haynes, Bristol, was held not sufficient.

The question occurs to one, where the simple and alternative mode pointed out by this section is not adopted of posting the notice to the place at which the bill is dated, on whom does the burden lie of showing that the other method has, in fact, been followed, and that the notice has been actually posted to the customary address or place of residence of the party? As the burden of proof of notice of dishonour is on the plaintiff, and this is one of the things necessary to make a good notice it would seem that he should prove that the address to which the notice had been posted was the customary address or the place of residence.

Notice where the address is not known.—Nothing is said in this section as to the case where the party bound to give the notice is unaware of the address of an indorser, except in so far as the section provides that a notice to an indorser addressed to the place where the bill is dated would be sufficient. In "Berridge v. Fitz-

* *Robinson* v. *Duff*, 2 Kerr, N. B., 206.

gerald,"[illegible] the plaintiff had supplied goods to a company in the way of trade and took a bill of exchange on the company indorsed by two of the directors. The notice of dishonour was addressed to the place of business of the company which was then in process of being wound up, but was not—until long after the dishonour of the bill—received by the defendant indorser, who had ceased to attend there on the company becoming embarrassed. It was held under the circumstances, the bill having been accepted and indorsed for the purposes of the company, that the defendant had authorized the plaintiff to treat the place of business of the company as the place to which notice of dishonour might be addressed. Blackburn, J., said that "the holder would be excused from giving notice if he could not find the indorser after due diligence in searching for him, and no place could be found at which to give the notice." See section 10[illegible]

Notice to wrong address.—Two cases are given by Maclaren as illustrations of the section, an Upper Canada and a Quebec case. The former is to the effect that an indorser's agent gave a wrong address which was written by the plaintiff under his signature and a notice sent to that address was held sufficient. "Vaughan v. Ross," 8 U. C. Q. B., 506. The latter case is to the effect that notice of protest sent to an indorser to a wrong address given by the maker when he got the note discounted was held not sufficient to bind the indorser. "Merchants' Bank v. Cunningham," Q. R., 1 Q. B., 33. The decision in the case first mentioned is put on the ground that the bank had used due diligence and was justified in relying on the information which had in fact been derived from the person who brought the note from the maker for discount and whom the head-note describes with doubtful accuracy as the agent of the indorser. The cases as stated in the form of illustrations do not illustrate anything. Everything depends on the grounds on which the conclusions are based. It is safe to say that a notice sent to the wrong address is not a good notice and the party who gave it must depend, not on the sufficiency of his notice, but on the validity of

[illegible] L. R. 4, Q. B., 639.

his excuse under section 106, unless such address is also the place at which the bill is dated.

Address given by party "under his signature."—These words mean not below his signature, but authenticated by the signature. The address so given need not be written by the party himself and a notice sent to the address so given by another person with his knowledge and consent is sufficient even if the holder has reason to know that it is not his residence or place of business. "Hay v. Burke," 16 O. A. R., 463.

Post-mark as evidence of date of notice.—The post-mark is not conclusive evidence of the date of posting. Where a notice was proved to have been mailed between 8 and 9 in the evening of the proper day it was held sufficient, although it bore the post-mark of the following day. "Wilson v. Pringle," 14 U. C. Q. B., 230.

Juridical day; notice received on Sunday.—Notice must be sent on the next following juridical day after it is received. A case occurred in England where an indorser received notice of dishonour on Sunday. Strictly, the next juridical day was Monday, and the act is silent about a notice received on a non-juridical day, but it will no doubt be held here as it was in England that the receiver was not bound to open his notice until Monday, and that a notice sent by him on Tuesday was therefore in time. "Wright v. Shawcross," 2 B. & Ald., at 501 n.

Notice by telegram two days after dishonour held sufficient.—In "Fielding v. Corry,"* the London Bank sent a notice of dishonour by post to a different branch from that from which the bill had been received, and on the following day, two days after the dishonour, discovering their mistake, telegraphed a notice to the proper branch. All the subsequent notices were in order, but the defendant relied on the failure to notify the proper branch at the proper time as a defence. A. L. Smith and Rigby, L. JJ., held the notice good, Collins, L. J., dissenting. A. L. Smith, L. J., said: "It seems to me that we would be frittering away the provisions of the statute if we were to hold that a mistake

* 1898, 1 Q. B., 268.

in an address could not be rectified if the effect of the rectification is that the person to whom the notice is sent, in point of fact gets notice in due course and in due time." Collins, L. J., regarded it as a fallacy to treat the case as if the notice had been sent to the right person at a wrong address. 'The different branches of the bank should be treated, under the statute, as different persons, and it was of no consequence, under the decisions, that the defendant had received notice as soon as she would have done if no break had occurred. The editor of the Canadian Bankers' Journal considers the decision doubtful,† but it will probably be followed in like cases and may be the beginning of a line of decisions breaking away from the technicality that has marked the development of the law on this point. Where no substantial wrong has been suffered by the party setting up the want of notice, and he has received as early notice as if everything had been regularly done, it is not surprising that there should be a tendency as manifested in this case to hold him liable.

Sender not responsible for miscarriage in Post Office.

104. Where a notice of dishonour is duly addressed and posted, as provided in the last preceding section, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office. 53 V., c. 33, s. 49. [E. s. 49 (15).]

Cross reference.—See notes under next following section.

Delay excused by circumstances not imputable to party giving notice.

105. Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct or negligence.

Cause of delay ceasing, notice must be given.

(2) When the cause of delay ceases to operate the notice must be given with reasonable diligence. 53 V., c. 33, s. 50. [E. s. 50.]

Difference between Canadian and English and American law.—Mr. Justice Maclaren suggests that in Eng-

† 5 J. C. B., 249.

land and the United States where no provision exists similar to that in the Canadian act recognizing as sufficient a notice posted to any party addressed to the place where the bill is dated, if no other address is given, circumstances would excuse delay which would not be sufficient in Canada, and that the only circumstances likely to cause excusable delay in giving notice would be the death, sudden illness or some accident to the person making out or posting the notices, or some accident to the messenger charged with taking them to the post office, or the loss of the letters on the way without negligence.[88]

Circumstances that have been held to excuse delay.—Among the circumstances that have been held to excuse delay in giving notice of dishonor are the following: A state of war rendering it impracticable,[89] an epidemic or other calamity making communication impracticable,[90] death or illness of the holder or his agent who has the bill,[91] a wrong or illegible address given by the indorser.[92]

Cause of delay ceasing to operate.—In "Studdy v. Beesty et al,"[93] the excuse for delay was that the holder was unable to find the drawer at the address given, although he had spent some time searching for him. Subsequently he learned where he was living, but instead of sending notice of dishonour he issued a writ. Bowen, L. J., treated the case as one in which there had been an excusable delay, but the cause of the delay ceasing to operate the notice should have been given. "The class of cases relied on by the appellant are cases of dispensation of notice, where notice is excused altogether because what has happened is equivalent to notice." If the action had been brought before the address was discovered, it would certainly have been held to be a case where notice was dispensed with altogether under clause

[88] *Maclaren on Bills*, 3rd. Ed. p. 277.
[89] *Windham Bank v. Norton*, 22 Conn. 213, (1852), and other cases in *Maclaren* at p. 277.
[91] *Rothschild v. Currie*, 1 Q. B., at p. 47.
[92] *Maclaren on Bills*, 3rd Ed., 277.
[93] 60 L. T. N. S., 647.

1 of section 106." The moral of this decision is therefore that if the plaintiff delays his action he must continue his "diligence." Lord Esher speaking to this point, concluded his opinion with the remark, "it is said on his" (plaintiff's) "behalf that business could not be carried on if such continuous diligence in serving the notice was necessary. The answer to that argument is that that diligence has been required since the time of Lord Ellenborough, and business has nevertheless been carried on."

Notice dispensed with.

106. Notice of dishonour is dispensed with,—

When after reasonable diligence impossible or does not reach drawer.

(a) when after the exercise of reasonable diligence, notice as required by this Act cannot be given to or does not reach the drawer endorser sought to be charged;

By waiver.

(b) by waiver express or implied.

Notice may be waived before time for giving or after omission to give due notice.

(2) Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice. 53 V., c. 33, s. 50. [E. s. 50.]

Does Canadian law differ from English?—Reference has already been made (ante p. 329) to the suggestion of Mr. Justice Maclaren that circumstances which would excuse delay in England would not be sufficient in Canada, because of the provision here allowing notice to be posted to any party addressed to the place where the bill is dated. "It has been held in England that ignorance of the place of residence of a drawer or indorser dispenses with notice if due diligence is used to discover it."[94] Whether where the address is known, a notice sent to the place where the bill is dated would be sufficient is another question. Section 103 seems to say that it would be sufficient in the case of a bill payable in Canada unless the party entitled to such notice has "under his signature," indicated some other place to which the notice should be sent. Notwithstanding this it would be unwise to omit sending notice to the actual

[94] *Maclaren*, 3rd Ed., at 278.

address if known, or making inquiry as to the actual address if unknown. A notice sent to the place where the bill is dated might not get within a thousand miles of the person entitled to the notice.

Notice otherwise than by post.—Mr. Justice Maclaren has a note under this section to the effect that "if notice is sent otherwise than by post and does not reach the party from some cause for which the sender is not responsible and the latter is not aware of the fact that the notice was not received it will be dispensed with."[95] But whether this be so or not in view of the provision making a notice by mail to the place where the bill is dated sufficient, it would be unwise to neglect sending such a notice by post. And furthermore, it may be questioned whether a party who undertakes to send a notice otherwise than by post does not take the risk of the agency he employs. The remarks of Lord Herschell in "Henthorn v. Fraser,"[*] seem to be in point. If the post office fails in its duty the sender is not responsible. Can he ever say that he is not responsible for the accident of non-delivery if he has ignored the post office and undertaken the duty himself? The case referred to, "Steinhoff v. Merchants' Bank,"[96] throws no light on the question.

Express waiver.—Little need be said of express waiver. The act provides by section 34 that the drawer of a bill or any indorser may insert therein an express stipulation waiving as regards himself some or all of the holder's duties. The waiver would be equally effective in any other form clearly expressing it.

Waiver by promise to pay,—must be with knowledge of facts.—As was said by Graham, E. J., in "McFatridge v. Williston,"[97] one cannot waive that which he does not know, citing "Goodall v. Dolley,"[98] and "Woods v.

[95] *Maclaren*, 3rd. Ed., at 278.
[*] 1892, 2 Ch. 27.
[96] 46 U. C. Q. B., 25
[97] 25 N. S., 13.
[98] 1 T. R., 712.

Dean,"[99] in the latter of which cases Blackburn, J., said: "Where a promise to pay is made by an indorser of a bill with full knowledge of the facts, and he is aware that he has had no notice of dishonor, that is equivalent to agreeing that he will not take advantage of the want of notice, in other words is a waiver of the right to notice. I take this to be established law, subject to the qualification in the text books, namely, that a promise to pay after the bill has been dishonored is not conclusive evidence of waiver."

How far the promise must be explicit.—In Bank of Montreal v. Scott,"[100] Morrison, J., quotes with approval the language of Story in his work on Promissory Notes, that "the promise to be obligatory must be deliberately made in clear and explicit language and amount to an admission of the right of the holder or of a duty and willingness of the indorser to pay." In the case referred to the language used by the defendant might have reference to two notes of which he had had notice of dishonor and did not necessarily refer to the particular bill of the dishonor of which notice had not been given.

The cases which are said to be very numerous and not easy to reconcile are referred to and discussed by Osler, J., in "Britton v. Milsom,"[1] where Miller, J., is quoted as saying in "Kilby v. Rochussen,"[2] "the result of the authorities upon the subject seems to be that a promise to pay the bill is an absolute waiver of a notice of dishonour and gives the go by to the question whether notice has or has not been given." But in the case before Osler, J., the most the evidence amounted to was that the indorser had said he would see the maker about paying the note, that he did see him and then reported that the maker said he would pay as soon as he could, adding a request, whether speaking for the maker or for himself and the maker, did not appear, that the holders would not "crowd the note." There was therefore no express promise. But although the plaintiff could not prove an

[99] 3 B. & S., 106.
[100] 24 U. C. Q. B., 115.
[1] 19 O. A. R., 96.
[2] 18 C. B. N. S., 357.

express promise, Osler, J., said it appeared from many authorities, some of which he cited, that something less than an express promise and any admission of liability might constitute evidence from which the court or judge might infer that notice was actually received by the defendant if his language and conduct in relation to the act were such as fairly to lead to that conclusion and to show that he considered that all was right and was conscious that he had no defence. Osler, J., in this case refers to the distinction which Chalmers says some of the cases fail to make between admissions of liability which are evidence of due notice having been received, and admissions when due notice has not been given and which therefore are evidence of waiver. The distinction Chalmers says is important, but Osler, J., apparently referring to the same distinction, says that many of the cases turn upon the distinction which formerly prevailed between using the subsequent promise as a waiver of notice, and as evidence of the fact of notice.

Must the plaintiff prove defendant's knowledge or the latter his ignorance of want of notice?—In the case already mentioned before Osler, J., that learned judge, referring to the promise to pay as evidence of waiver, says that "such a promise, as stated in the leading text book on the subject, entirely dispenses with proof of presentment and throws upon the defendant the double burden of proving laches, e.g., non-presentment, and that he was ignorant of it when he made the promise."

Notice dispensed with as regards drawer.

107. Notice of dishonour is dispensed with as regards the drawer where,—

When drawer and drawee the same.

(a) the drawer and drawee are the same person;

When drawee fictitious or not capable of contracting.

(b) the drawee is a fictitious person or a person not having capacity to contract;

When drawer is person to whom bill presented for payment.

(c) the drawer is the person to whom the bill is presented for payment;

When drawee is not between himself and drawer under obligation to pay bill.

(d) the drawee or acceptor is, as between himself and the drawer, under no obligation to accept or pay the bill;

When drawer has [redacted] manded payment.

(e) the drawer has countermanded payment. 53 V., c. 33, s. 50. [E. s. 50.]

Notice to drawer dispensed with where he is primarily liable.—In most of the cases referred to in this section the drawer is the person primarily or solely liable on the bill. Such is the case where the drawer and drawee are the same person. So also where the drawee is a fictitious person or a person not having capacity to contract, in which case as provided by section 26 the instrument may be treated as a promissory note made by the drawer who thus becomes the party primarily liable. So as to the case referred to in sub-section (d). The cases referred to in sub-sections (c) and (e) must be specially dealt with.

Where the bill is presented to drawer for payment.—Does this mean that if the holder were to present any bill to the drawer for payment this would dispense with a notice of dishonour to that drawer if the acceptor should fail to pay it? Or does it simply mean that notice of dishonour to the drawer is dispensed with where the bill is properly presented to the drawer for payment, where, for instance, the drawer has become the executor of the acceptor? The clause appeared in Chalmers' Digest[3] in the form of a statement that notice of dishonor was dispensed with when the drawer or indorser sought to be charged was the person to whom the bill was presented for payment, and the illustration given was the case of "Caunt v. Thompson,"[4] where the drawer was at the house of the acceptor and the bill was there presented and shown to the drawer, who stated that the acceptor was dead and he was the executor, adding a request that the bill might be allowed to stand over for a few days and he would see it paid. Cresswell, J., said that in this case the defendant knew that the bill was dishonored and he knew it from the best source, namely, his own personal act in dishonoring it when presented by the holder. It would have been an absurdity to require the plaintiff to have stated to the defendant when he dis-

[3] *Chalmer's Digest.*
[4] 18 L. J. C. P., 125.

honored the bill, "take notice that this bill has been dishonored by you." It does not follow from this reasoning that mere presentment for payment to the drawer or indorser would dispense with notice of dishonor in a case where the drawer or indorser was not the person to whom the bill could properly be presented for payment. It may be held, however, that as the language of the clause goes far beyond the case on which it is founded the same thing will happen that happened in Vaglianos' case and the clause will be construed literally so as to dispense with notice of dishonour in such a case, and in support of this construction it may fairly be argued that the presentment to the drawer is considered by the law equivalent to a notice of dishonour. It certainly gives notice to the drawer that he is looked to for payment of the bill.

Where the drawer has countermanded payment.—It appears from a previous note on page 296 (ante), that the countermand by the drawer not only dispenses with notice of dishonour but with presentment in the case of a cheque, though not always in the case of a bill other than a cheque.

Notice of dishonour dispensed with as regards endorser

108. Notice of dishonour is dispensed with as regards the endorser where,—

When drawee fictitious or incapable of contracting, and endorser aware when bill endorsed.

(a) the drawee is a fictitious person or a person not having capacity to contract, and the endorser was aware of the fact at the time he endorsed the bill;

When endorser is person to whom bill presented for payment.

(b) the endorser is the person to whom the bill is presented for payment;

Where bill accepted for his accommodation.

(c) the bill was accepted or made for his accommodation. 53 V., c. 33, s. 50. [E. s. 50.]

Where drawee is fictitious, &c.—In this case the bill may be treated as a promissory note, but it is the drawer's promissory note to the payee, who is the indorser, and if he does not pay it, it is not obvious but for the act, that he should not have notice of dishonor. Maclaren says he should not because he has no reasonable

ground for believing that the bill will be honored, secondly, he is aware that it is not paid and he is the person who ought to pay it.[5] None of these things may be true. All the indorser may know is that the drawee is a fictitious person and that therefore the instrument may be treated as a note. But the indorser of a note is entitled to notice of dishonor, and the indorser moreover if he is not the payee, may well expect that the drawer will see that the bill is paid even though it has for some purpose of the drawer's been drawn upon a fictitious person or one not having capacity to contract.[6] The act having dealt with the matter, its further discussion would not be profitable. The case referred to in the next following note seems relevant to the discussion.

Where the fictitious nature of the instrument is not known.—The statute dispenses with notice of dishonor only in cases where the indorser was aware at the time he indorsed the bill that the drawee was a fictitious person or a person not having capcity to contract. Where he is unaware of these facts the indorser is entitled to notice. In "Leach v. Hewitt,"[7] it was held that one who without consideration, but without fraud, indorsed a bill in which both the holder and the acceptor were fictitious persons, was entitled to notice of the dishonor of the bill. Chambre, J., referred to a "very sensible note" in Bayley on Bills upon the case of "DeBerdt v. Atkinson." "The court appears to have proceeded on a misapplication of the rule which obtains as to accommodation acceptances; in those cases, the drawer, being himself the real debtor, acquires no right of action against the acceptor by paying the bill, and suffers no injury from want of notice of non-payment by the acceptor. But in this case the maker was the real debtor, and the payee a surety, having a clear right of action against the maker upon paying the note, and therefore entitled to notice to enable him to exert that right."

[5] See Chalmers Dig., p. 154.
[6] 4 *Taunt*, 731; 2 *Ames, Cases on B. & N.*, 467.
[7] 4 *Taunt*, 731 (1813).

Where bill is presented to indorser for payment.—The observations made under the preceding section, page 334 and following pages, apply to this case.

Accommodated indorser.—The reasoning of Maclaren, referred to on p. 335, is fully applicable to this case. The indorser is liable without notice because he is the person who ought to have paid and ought to pay the bill.

Notice to others than drawer and indorser.—The maker of a note or acceptor of a bill is liable without notice. Guarantors are somewhat in the position of indorsers. Their liability is as sureties and may be discharged by dealings of the creditor with the principal debtor. But they are not entitled to strict notice of dishonour. Of course there must be a demand before suit can be brought against a guarantor on his guarantee.

PROTEST.

Protest not necessary to bind acceptor.

109. In order to render the acceptor of a bill liable it is not necessary to protest it. 53 V., c. 33, s. 52. [E. s. 52.]

Protest dispensed with by circumstances dispensing with notice of dis-[redacted]

110. Protest is dispensed with by any circumstances which would dispense with notice of dishonour. 53 V., c. 33, s. 51. [E. s. 51.]

Delay in noting or protesting excused by circumstances not imputable to holder.

111. Delay in noting or protesting is excused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence.

When cause of delay ceases bill must be noted or protested with reasonable diligence.

(2) When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence. 53 V., c. 33, s. 51. [E. s. 51.]

Cross references.—The circumstances which would dispense with notice of dishonor are stated in section 106 commented on at page 331, ante.

The comments on the preceding pages are also applicable to these sections.

Foreign bill must be protested for non acceptance.

112. When a foreign bill appearing on the face of it to be such has been dishonoured by non-acceptance it must be duly protested for non-acceptance.

Also for non-payment if not previously dishonored by non acceptance.

(2) Where a foreign bill which has not been previously dishonoured by non-acceptance is dishonoured by non-payment, it must be duly protested for non-payment.

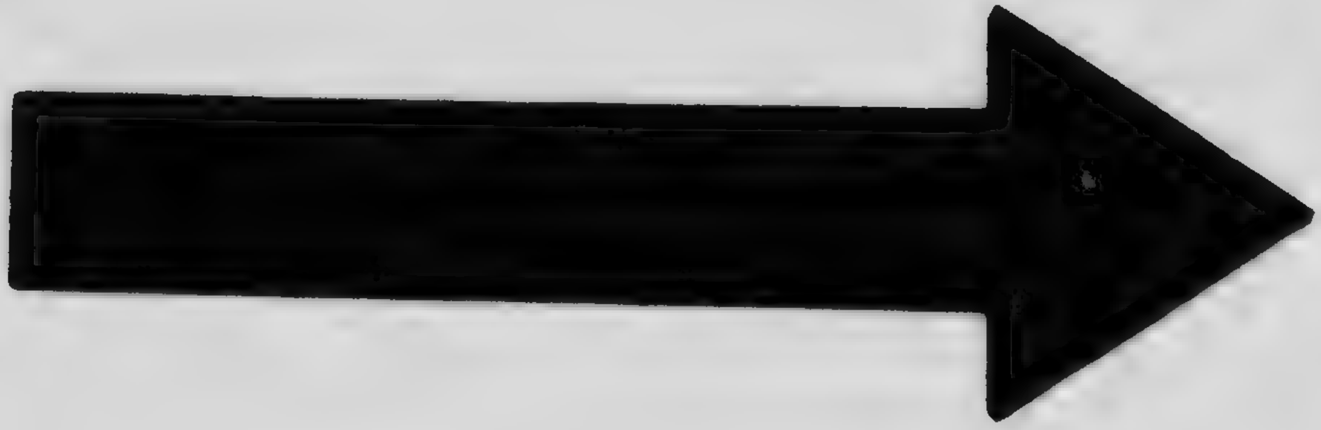
Where accepted for part must be protested as to balance.

(3) Where a foreign bill has been accepted only as to part it must be protested as to the balance.

If not duly protested drawer and endorsers discharged.

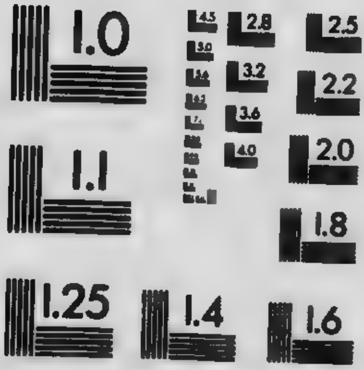
(4) If a foreign bill is not protested as by this section required the drawer and indorsers are discharged. 53 V., c. 33, ss. 44 and 51. [E. ss. 44 and 51.]

Foreign bill defined ante.—The definition of a foreign bill is given in section 25. An inland bill is one which is or or on the face of it purports to be both drawn and payable in Canada or drawn within Canada upon some person resident therein. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill the holder may treat it as an inland bill. It is in accordance with this latter provision that the present section requires protest only where the bill appears on its face to be a foreign bill. A bill may not in fact come within the conditions that make it an inland bill and yet the holder may be entitled to treat it as such. It would have been safer in the following sub-sections to refer to "such" foreign bill, following the phrasing of the section from which these sub-sections are taken. The use of the term "foreign bill" in the second, third and fourth sub-sections without the qualification contained in the first leaves room for a contention that the law has been changed and that a bill which is really a foreign bill but does not appear on its face to be such, must be protested. But the answer to this contention would seem to be that it is expressly declared by section 25



MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



that unless the contrary appears on the face of the bill the holder may treat it as an inland bill. If this is a good answer, it would also have rendered the qualification unnecessary in the first clause of the section. On the whole, therefore, it would be safer to restore the expression used in the act of 1890.

Inland Bill may be protested but protest not necessary except in Quebec.

113. Where an inland bill has been dishonoured, it may, if the holder thinks fit be noted and protested for non-acceptance or non-payment as the case may be; but it shall not, except in the Province of Quebec, be necessary to note or protest an inland bill in order to have recourse against the drawer or indorsers. 53 V., c. 33, s. 51. [Cf. E. s. 51.]

No protest necessary on dishonour of inland bill.—This section points to the distinction between an inland and a foreign bill. If a foreign bill is dishonored by non-acceptance or non-payment, protest is necessary in order to charge the drawer and indorsers. Protest of an inland bill is not necessary for such purpose, and previously to the act of 1890 it was not proper to protest such a bill. That is if the holder did protest he had to do so at his own expense. He could not charge the costs of the protest to the parties liable on the bill. He now has the option to protest if he thinks fit and charge the cost of the protest. See, however, following paragraph.

Excepting in Quebec, or to charge acceptor supra protest, or case of need.—The Province of Quebec has a different rule from the other provinces in regard to the duty of protesting. There, protest must be made in the case of all dishonored bills. The law of that province has been retained as embodied in Articles 2298 and 2319 of the Civil Code. In the provinces other than Quebec the protest of an inland bill dishonored by non-acceptance is merely a preliminary to acceptance supra protest for the honor of the party liable thereon pursuant to section 147; or in order to comply with section 117, which provides that where a dishonored bill has been accepted for honour supra protest, or contains a refer-

ence in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honour or referee in case of need, and that where a bill of exchange has been dishonoured by the acceptor for honour it must be protested for non-payment by him.

Quebec law as to protest applicable to inland bill drawn on any person in Quebec or payable or accepted at any place in Quebec.

114. In the case of an inland bill drawn upon any person in the Province of Quebec or payable or accepted at any place in the said Province the parties liable on the said bill other than the acceptor are, in default of protest for non-acceptance or non-payment as the case may be, and of notice thereof, discharged, except in cases where the circumstances are such as would dispense with notice of dishonour.

Except as in this section provided, protest not necessary unless bill appears on face to be foreign.

(2) Except as in this section provided, where a bill does not on the face of it appear to be a foreign bill, protest thereof in case of dishonour is unncessary. 53 V., c. 33, s. 51. [Cf. E. s. 51.]

Conflict of laws.—Mr. Justice Maclaren says[8] where a bill or note was made payable in Lower Canada, the law of that place was held to govern as to the sufficiency of notice of dishonor although the indorser resided in Upper Canada and made the indorsement there, for which he cites "City Bank v. Ley,"[9] and "Smith v. Hall."[10] This is in accordance with the principle underlying secton 162 that the duties of the holder with respect, among other things, to the necessity for and sufficiency of the notice of dishonour are determined by the law of the place where the bill is dishonoured. Where the bill is payable in Quebec the provisions of the section now under consideration are consistent with this principle. But where the bill is merely drawn on some person in the Province of Quebec and is payable elsewhere, the policy of this section is not consistent with that of section 162. Under the principle of section 162,

[8] *Maclaren on Bills*, 3rd Ed., p. 284.
[9] 1 U. C. Q. B., 192 (1843).
[10] 3 U. C. Q. B., 315 (1847).

the holder's duties as to protest would be governed by the law of the place where the bill was made payable, and where, therefore, it was dishonored. There is no great harm in this because all parties can govern themselves by the law as here laid down. But the section further seems to say that where the bill is accepted at any place in the Province of Quebec the same principle applies. Would it be possible under this provision that a bill drawn upon some person not in the Province of Quebec and payable elsewhere than in Quebec would be governed by this clause because it happened to have been accepted at some place in Quebec? Would this result follow even though the holder did not know that it had been so accepted and the acceptance did not show where it had been made? If so, the act needs to be amended. The point does not seem to have ever arisen. Even apart from this question, Mr. Justice Maclaren criticizes the departure in this section from the policy of section 162, which embodies the principle of conflict of laws applicable to the case. He says: " According to the clause, every inland bill drawn upon any person in Quebec, or accepted at any place in that province, must be protested in order to hold the drawer and indorsers, even if it be drawn and made payable in another province. According to the recognized rules of interpretation, this last clause being exceptional and explicit, would govern, although it is certain that parliament did not contemplate any such departure from the general rule."*

Bill protested for non-acceptance &c., may be subsequently protested for non-payment.

115. A bill which has been protested for non-acceptance, or a bill of which protest for non-acceptance has been waived, may be subsequently protested for non-payment. 53 V., 33, s. 51. [E. s. 51.]

Presentation for payment of bill previously dishonored by non-acceptance.—As already stated, the holder of a bill which is dishonored by non-acceptance must give notice of dishonor to the drawer and indorsers, but subject to this duty he may hold it until maturity and present it for payment.

* *Maclaren on Bills*, 3rd. Ed., 284.

Protest for better security where acceptor suspends payment.

116. Where the acceptor of a bill suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and endorsers. 53 V., c. 33, s. 51; 54-55 V., c. 17, s. 7. [E. s. 51.]

Short history of the clause.—The Imperial act provides (sec. 51, [5]) that where the acceptor of a bill becomes bankrupt or insolvent or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.. In the Canadian act of 1890, the words, "or insolvent," were omitted, but the words referring to bankruptcy were retained. There being no general bankrupt act for Canada, these words were struck out by the amending act of 1891.

Purpose of clause.—The only effect of this clause seems to be, as stated by Chalmers,[11] that the bill may be accepted for honor. Under some of the continental codes, he says, when the acceptor fails during the currency of the bill, security can be demanded from the drawer and indorsers, and in France, if the acceptor fails, the bill may at once be treated as dishonored and protested for non-payment.

Bill accepted for honour or containing reference to case of need must be protested before presented for payment to acceptor for honour or case of need.

117. Where a dishonoured bill has been accepted for honour supra protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honour, or referee in case of need.

Bill dishonoured by acceptor for honour must be protested.

(2) When a bill of exchange is dishonoured by the acceptor for honour, it must be protested for non-payment by him. 53 V., c. 33, s. 66. [E. s. 67.]

Consequences of failure to protest.—The section is silent as to the consequences of failure to protest in such a case for non-payment, but Maclaren says[12] that the fact

[11] *Chalmers on Bills*, 6th Ed., 176.

[12] *Maclaren on Bills*, 358. The text reads "failure to present," which presumably a misprint for "protest"

that a protest for non-payment is required in all cases where an acceptor for honor refuses to pay a bill, even when no one has indorsed the bill subsequent to his acceptance for honor, would seem to favor the idea that failure to protest it would not only release him but also release the party for whose honor he had accepted and subsequent parties. Notice of dishonor should be sent to each of these parties.

See next following section to the effect that noting is sufficient compliance within the time limited for protest, to be followed by extension of the protest later.

Noting within specified time is sufficient compliance with requirement of protest.

118. For the purposes of this Act, where a bill is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding. 53 V., c. 33, s. 92. [E. s. 93.]

Noting protest is sufficient, followed by extension later.—Chalmers notes[13] that this section affirms the rule laid down in "Geralopulo v. Wheeler,"[14] and adds that "the noting is in fact an incipient protest and is unknown in law as distinguished from the protest. The notary having made his minute draws up the protest at his leisure."

Protest must be made or noted on day of dishonour.

119. Subject to the provisions of this Act, when a bill is protested the protest must be made or noted on the day of its dishonour.

Protest may be extended any time thereafter as if day of noting.

(2) When a bill has been duly noted, the formal protest may be extended thereafter at any time as of the date of the noting. 53 V., c. 33, ss. 51 and 92. [E. ss. 51 and 93.]

See next previous section.

[13] *Chalmers on Bills*, 5th. Ed., 284.
[14] 20 T. J., C. P., 105.

Protest may be made on a copy or written particulars of bill.

120. **Where a bill is lost or destroyed, or is wrongly or accidentally detained from the person entitled to hold it, or is accidentally retained in a place other than where payable, protest may be made on a copy or written particulars thereof.** 53 V., c. 33, s. 51. [E. s. 51.]

Protest on copy or particulars of bill.—The section differs slightly from the corresponding section of the Imperial act, in which no reference is made to the accidental detention of the bill from the person entitled to hold it, or its accidental retention in a place other than where it is payable. Maclaren says that the right to make a protest on a copy of a lost note or bill has long been recognized, citing "Dehers v. Harriot."[15]

Bill must be protested where dishonoured or within five miles of place of presentment.

121. **A bill must be protested at the place where it is dishonoured, or at some other place in Canada situate within five miles of the place of presentment and dishonour of such bill: Provided that,—**

Provided bill presented through P. O. and returned by post may be protested at place to which returned on day of or after return

(a) when a bill is presented through the post office and returned by post dishonoured, it may be protested at the place to which it is returned, not later than on the day of its return or the next juridical day.

Protest for non-acceptance may be any time thereafter; for non-payment, any time after 3 P. M.

(b) every protest for dishonour, either for non-acceptance or non-payment may be made on the day of such dishonour, and in case of non-acceptance at any time after non-acceptance, and in case of non-payment at any time after three o'clock in the afternoon. 53 V., c. 33, s. 51. [Cf. E. s. 51.]

Cross references.—As to presentment through the post office, see section 90. Juridical day is defined inferentially in section 43.

[15] 1 Shower, 163 (1690).

When protest must be made.—When the protest is for non-acceptance it may be made at once after the bill has been presented for acceptance and acceptance has been refused. It must be borne in mind in this connection that the drawee has two days to make up his mind whether he will accept or not, under section 80, ante p. 272. But in the case of protest for non-payment the protest should not be made until 3 o'clock, the reason for the distinction being that the holder is entitled to have an acceptance or refusal to accept on presentation, but in the case of payment, the party paying is entitled to all the banking hours of the last day of grace to raise the money. Even though the banks close on Saturday at noon, or one o'clock, the same rule governs as to time for protest as on other days of the week.

Hour for protesting.—The question is asked in The Canadian Bankers' Journal,* whether it is legal to protest a note at one o'clock on Saturday, and the response is that the answer given in a previous volume (III, p. 201) applies equally to Saturday, that the protest cannot be made on any day before 3 o'clock. "This does not in any way conflict with the right of the bank to close its doors at one o'clock. As explained in the answer above referred to, the notary might present a cheque at ten in the morning, and if then dishonored, would do his full duty if he simply held it till three o'clock and thereafter completed the protest without further presentation." The editors do not, of course, mean that it would be necessary even then to extend the protest. Noting is sufficient on the day of protesting. See section 118, ante page 344.

By whom notary's presentment must be made.—Maclaren has a note under this section[16] that in England, Canada and most of the United States, bills as a rule are not presented by the notary in person, but by his clerk. Where such a usage prevails it will be recognized. The case of "Boas v. McCartney" is referred to where this was held by Galt, C. J., in Ontario, affirmed by the Queen's Bench Divisional Court, 1889, not reported.

* 7 J. C. B., 35.
[16] *Maclaren on Bills*, 3rd Ed., 289.

Protest must contain copy of bill or annex original and be signed.

122. **A protest must contain a copy of the bill, or the original bill may be annexed thereto, and the protest must be signed by the notary making it, and must specify,—**

Must specify person requesting protest.

(a) the person at whose request the bill is protested;

Place and date.

(b) the place and date of protest;

Cause.

(c) the cause or reason for protesting the bill;

Demand and answer.

(d) the demand made and the answer given, if any; or

Or that party could not be found.

(e) the fact that drawee or acceptor could not be found. 53 V., c. 33, s. 51. [E. s. 51.]

Notarial seal not required.—In the Nova Scotia case of "Merchants' Bank v. Spinney,"[17] Sir William Young held, against the ruling of Robinson, C. J., in Ontario, that a seal was essential to the validity of a notarial protest; but the difference of opinion is now unimportant. The act does not require that the protest should be sealed. Nevertheless, as Maclaren suggest, it is well in the case of foreign bills for a notary to use his seal, as in some countries a protest will not be received in evidence without an official seal.

Protest for qualified acceptance should so state.—Mr. Justice Maclaren cites two cases to the effect that when a protest is made for a qualified acceptance it must not state a general refusal to accept, otherwise the holder cannot avail himself of the qualified acceptance.[18]

Where notary cannot be obtained, Justice of the Peace may protest and give notices.

123. **Where a dishonoured bill is authorized or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured, any justice of the peace resident in the place may present and protest such bill and give all necessary notices and shall have all the necessary powers of a notary in respect thereto.** 53 V., c. 33, s. 93. [Cf. E. s. 94.]

[17] 1 R. & G., 91

[18] *Maclaren on Bills*, 3rd Ed., p. 290.

What is meant by the "place" where the bill is dishonored?—The place where the bill is dishonored is that at which it should have been paid or accepted as the case may be. But how far from the bank or other place must the holder go before concluding that there is no notary whose services can be obtained? Section 121 provides that the bill must be protested at the place where it is dishonoured, or at some other place within five miles of the place of presentment and dishonour of such bill. The distinction here drawn between the place where the bill is dishonored and the circle with a five mile radius, within which the bill may be protested forbids the construction that the holder is bound to employ a notary if he can be found within these limits. On the other hand, he cannot dispense with the notary's services because there does not happen to be one in the office or bank at which the bill has been dishonored. Probably the place means the city or town, or village in which the bill has been dishonored. If the dishonor has occurred outside of a city, town or village, the question is not likely ever to arise in practice.

Expense of noting and protesting payable to holder.

124. The expense of noting and protesting any bill and the postages thereby incurred, shall be allowed and paid to the holder in addition to any interest thereon.

Notaries' fees.

(2) Notaries may charge the fees in each province heretofore allowed them. 53 V., 33, s. 93.

Notarial fees for protest.—The tariff of fees for notarial protest will be found in Appendix II, immediately after the forms contained in the appendix to the act.

Forms in schedule.

125. The forms in the schedule to this act may be used in noting or protesting any bill and in giving notice thereof.

Copy of bill may be included or original bill annexed.

(2) A copy of the bill and endorsement may be included in the forms, or the original bill may be annexed and the necessary changes in that behalf made in the forms. 53 V., c. 33, s. 93. [Cf. E. s. 94.]

Forms of protest. Duplicate not necessary.—These forms are contained in the schedule, from A to J inclusive. Mr. Justice Maclaren explains[19] that those in the first schedule to the act of 1890, were copied without change from schedule B, to R. S. C. (1886), chap. 123, where they were applicable to the Province of Quebec alone, having been inserted there from the schedules to chapter 64 of the Consolidated Statutes of Lower Canada. It will be observed, he says, that the words, "protested in duplicate," have been retained, adding that in Quebec it was formerly compulsory to make out the protest in duplicate and to copy the bill or note in the protest. "Neither of these is required by the present act, so that these words are now inappropriate."

Attesting witness and seal of J. P.—Maclaren points out that form J provides for an attesting witness and the seal of the justice of the peace, although neither of these is required by the act. He suggests that as a matter of prudence it might be well to have a witness sign and to affix a seal, although the use of the forms is not imperative and immaterial variations will not vitiate them.

Mistake in protest.—The Canadian Bankers' Journal contains a note* as to the effect of an error in the protest in the declaration of the notary that he had presented it at a bank named, whereas it had been presented at a different bank at which it was payable. The response to the question is, that "the Act of Protest is merely a certificate as to what the notary has done, and could be corrected at any time." The answer proceeds to point out that in the case stated there was no essential error.

Cross reference.—See sections 98 and 103 (ante p. 311, 325, as to the way in which notice of dishonor must be given. Juridical or business day is inferentially defined in section 43.

[19] *Maclaren on Bills*, 3rd Ed., p. 437.
* 7 J. C. B., 289.

Notice sufficiently given on day protest made or next following juridical day to same parties and in same manner as notice of dishonour.

126. Notice of the protest of any bill payable in Canada shall be sufficiently given and shall be sufficient and deemed to have been duly given and served, if given during the day on which protest has been made or on the next following juridical or business day, to the same parties and in the same manner and addressed in the same way as is provided by this part for notice of dishonour. 53 V., c. 33, s. 49.

Liabilities of Parties.

Bill does not operate as assignment of funds. Drawee not accepting is not liable on instrument.

127. A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this act is not liable on the instrument. 53 V., c. 33, s. 53. [E. s. 53.]

A bill is not an assignment of funds in the drawee's hands.—We have seen ante p. 63, that where an order to pay is drawn payable out of a particular fund it is not a bill of exchange at all. Such an instrument may operate as an equitable assignment. The English and American authorities on this subject, as Chalmers points out,[20] are collected and reviewed in the New York case of " Munger v. Shannon," and he says that the tendency in New York seems to be to give effect to an order rather as an equitable assignment than as a bill. Cases of this class have been discussed, ante p. 69.

Difference between a bill and an equitable assignment.—That there are many differences is obvious. Some of these, as Chalmers says, are pointed out in the case of " Glyn v. Hood,"[21] in which case an agent of the outgoing partner of a firm gave the plaintiffs an order on parties having funds of the firm in their hands, to pay $5,000 out of such funds to the plaintiff. This was by way of collateral security for a loan by the plaintiffs to

[20] *Chalmers on Bills*, 6th Ed., p. 13.
[21] 1 D. F. & G. at 348.

the outgoing partner. The plaintiffs presented the order and were informed that there were no funds with which to pay it. No notice of this was given by plaintiff to the holders. Turner, L. J., said: "The defendants by whom this appeal has been presented have contended that the plaintiffs are nevertheless chargeable with this sum of $5,000, insisting that it was by their default only that it was not received and that the same obligation of diligence attached upon them as would have attached upon the holder of a bill of exchange or promissory note. It does not seem to me, however, that the obligations which attach upon holders of bills of exchange and promissory notes have anything to do with this case. This is not the case of a bill of exchange or promissory note, but of an assignment of a debt. In bills of exchange and promissory notes the time for payment is fixed and there is no particular fund out of which payment is to be made. Here, there is no time for payment fixed and there is a fund for payment. Bills of exchange and promissory notes are governed by the mercantile law. Assignments of debts are not, as I conceive, so governed. In the case of bills of exchange and promissory notes the question is of the discharge of third persons, not of the acceptor or maker. Here the question is of the discharge of the fund itself."

No privity between holder and drawee without special agreement.—The drawee who does not accept is not, under this section, liable on the instrument, and there is no privity of contract between him and the holder. After acceptance there is, of course, a contract by the drawee as acceptor to pay according to the tenor of the bill. But even before acceptance "privity may be created by an agreement external to the bill, and the actions of the parties are then regulated by the terms of the agreement."[22]

Exceptional case of a cheque.—A cheque is not an assignment any more than any other bill of exchange. The definition of a cheque is that it is a bill of exchange payable on demand. It is therefore governed by the prin-

[22] *Chalmers on Bills*, 6th Ed., 183.

ciple expressed in this section; but, as Chalmers points out,* by section 166, a quasi privity has been created between the holder of the cheque and the drawee, the section enacting that when the holder of a cheque omits to present it within a reasonable time whereby the drawer has been damnified (i. e., by the bank failing), the drawer is "pro tanto" discharged and the holder is substituted as a creditor of the bank.

Acceptor engages to pay according to tenor.

128. The acceptor of a bill, by accepting it, engages that he will pay it according to the tenor of his acceptance. 53 V., c. 33, s. 54. [E. s. 54.]

Cross reference.—The different kinds of acceptance, general and qualified, and the various ways in which the acceptances may be qualified have been fully dealt with under section 38, page 127. The consequences of taking a qualified acceptance have also been there pointed out.

Acceptor is the primary debtor.—It has already been stated[23] that the acceptor of a bill of exchange holds a position analogous to that of the maker of a promissory note. He is the party primarily liable on the bill, to whom the holder must look in the first place for payment. The drawer is only liable to the holder in default of payment by the acceptor and upon receiving due notice of dishonor. The indorsers are in like manner mere sureties for the payment of the bill by the acceptor. These are the relations of the parties prima facie, but it will be seen that where the acceptor is an acceptor for the accommodation of the drawer the relations are altogether different from those described.

Acceptor precluded from denying to holder in due course.

129. The acceptor of a bill by accepting it is precluded from denying to a holder in due course,—

Existence capacity and authority of drawer and genuineness of signature.

(a) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill;

* *Chalmers on Bills*, 6th Ed., 183

[23] See also section 186.

Capacity of drawer to endorse if drawn to his order but not genuineness or validity of indorsement.

(b) in the case of a bill payable to drawer's order, the then capacity of the drawer to endorse, but not the genuineness or validity of his endorsement;

Existence and capacity of payee but not genuineness or validity of indorsement.

(c) in the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to endorse, but not the genuineness or validity of his endorsement. 53 V., c. 33, s. 54. [E. s. 54.]

Cross references.—Holder in due course is defined in section 59 as one "who has taken a bill complete and regular on the face of it under the following conditions, namely, (a) that be became holder of it before it was overdue and without notice that it had been previously dishonored if such was the fact; (b) that he took the bill in good faith and for value and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it."

Forged signature of drawer.—Mr. Justice Maclaren points out that section 49 of the act enacts that subject to the provisions of the act where a signature on a bill is forged, the forged signature is wholly inoperative. The present section is one of those to which the enactment is thus made subject. As Mr. Justice Maclaren says, it has been long recognized as law that the acceptor cannot be heard to say against a holder in due course that the signature appearing to be that of a drawer has been forged. And Chalmers in his digest thus stated the principle[24], "the acceptor by the fact of his acceptance conclusively admits and warrants to a bona fide holder the existence of the drawer, the genuineness of his signature and his capacity and authority to draw."

No estoppel as against alteration.—The genuineness of the signature must not be confounded with the genuineness of the bill. If after the bill has been drawn it has been materially altered the acceptor does not by his acceptance preclude himself from setting up that fact.

[24] Chalmers' Dig., 165.

The only English case cited by Chalmers and Maclaren[25] in this connection was a case where the alteration had been made after the bill had been accepted, which, of course, discharged the acceptor even as against a bona fide holder. But an American case is contained in Ames' collection of cases on Bills and Notes, in which it was held that a banker in certifying a cheque did not preclude himself from showing that it had been raised from $25.00, for which it had been drawn, to $4,079.96.*

Distinction between capacity to indorse and authority to indorse.—The acceptor by the act of acceptance "conclusively admits and warrants to a bona fide holder" the capacity of the payee to indorse, but not the validity of the indorsement. Judge Chalmers says it is clear that capacity to draw must be identical with capacity to indorse, this being a question of status, while an authority to draw on behalf of another does not necessarily include an authority to indorse on his behalf.[26] The author is probably speaking here of the act of indorsement in its full sense of not merely transferring a right, but incurring the obligation of an indorser; because he has on a previous page pointed out that an infant can indorse a bill with the effect of transferring the right, although he cannot incur any liability on a contract as an indorser. He adds that the distinction between capacity and authority reconciles the cases which otherwise appear to be in conflict.

Drawer engages for acceptance and payment on due presentment and compensation to holder or endorser if compelled to pay, on requisite steps being taken.

130. The drawer of a bill, by drawing it,—

(a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonoured he will compensate the holder or any endorser who is compelled to pay it, if the requisite proceedings on dishonour are duly taken;

Drawer precluded from denying to holder in due course existence of payee and capacity to endorse.

(b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to endorse. 53 V., c. 33, s. 55. [E. s. 55.]

[25] *Birchfield* v. *Moore*, 3 E & B., 683 (1854.)

* *Marine National Bank* v. *City Bank*, 50 N. Y., 67. The case is questioned by Ames, Vol. 2, p 802, and will be further considered when dealing with the provisions as to cheques.

[26] *Chalmers on Bills*, 6th Ed., p. 188.

Cross reference. The requisite proceedings on dishonour.—See sections 96 to 108 as to notice of dishonour, and sections 109 to 126 as to protest. As to express stipulations by the drawer or indorser negativing or limiting his own liability to the holder, or waiving as regards himself any of the holder's duties, see section 34. As to measure of damages, see section 134.

Capacity distinguished from genuineness of endorsement or authority to endorse.—The same remark applies to this section as to the one in reference to the acceptor's estoppels. The drawer is not precluded from denying, even to a holder in due course, the authority of the payee to endorse, or the genuineness of the alleged endorsement.

No person liable as drawer, acceptor, or endorser, who has not signed as such. Proviso as to person signing otherwise who incurs liabilities of an endorser.

131. No person is liable as drawer, endorser or acceptor of a bill who has not signed it as such: Provided that when a person signs a bill otherwise than as a drawer or acceptor he thereby incurs the liabilities of an endorser to a holder in due course, and is subject to all the provisions of this Act respecting endorsers. 53 V., c. 33, ss. 23 and 56.

None but parties signing liable on the bill.—Ordinarily in the case of a written contract, signed by a person as principal, who is in fact an agent for another, parol evidence can be given to show that the agent has an undisclosed principal who thereby becomes liable on the instrument as a party, although it does not follow that the agent ceases to be liable. The distinction is taken that it does not contradict the terms of the document to show that another who has not signed is liable on it, but it would contradict it to show that the person signing as a principal was not liable* The doctrine of these cases is by this section made inapplicable to the case of a bill or note. The liability here negatived is simply a liability on the bill. The section does not deal with any question as to the liability that may have been incurred in the transaction apart from the bill. As to that, the general law of contract is left to its operation.

* *Higgins* v. *Senior*, 8 M. & W. 834, cf. *Trueman* v. *Loder*, 11 A. & E. 589.

Endorsement by one who is not payee or holder. Difference between English and Canadian law.—The subject dealt with in the proviso has given rise to an immense volume of confusing controversy and conflicting cases. It was in a fair way to be settled, and in fact had been settled in accordance with common sense and the intentions of the parties, when an unfortunate decision of the House of Lords, in "Steele v. Mackinlay," by Lord Blackburn, threw the whole question into confusion, from which it has not yet recovered in England. Happily for Canada, our Supreme Court has read this proviso in the sense which it naturally bears, and has determined that where a person who is not the payee or holder of the bill puts his name on the document otherwise than as drawer or acceptor, he incurs the liabilities of an endorser to a holder in due course. A person so signing cannot in the regular order of things be an endorser. None but the payee or a holder can be an endorser, but he must have had some object in placing his name on the bill and under the Canadian decisions he is treated as if he were an endorser, as the statute obviously intended that he should be. The purpose of the act has been defeated in England by a sophistical process of reasoning to which reference will be made in the following note. One of the Canadian cases that have settled the law is, "Ayr American Plough Company v. Wallace,"* in which the defendant had written his name across the back of a note made by Clark to the plaintiff company for the price of goods. He was sued as a maker, which of course he was not, but Strong, C. J., said it was clear that under section 56, (which contained the proviso now under consideration), the respondent would have been liable as indorser. The reason given by the learned Chief Justice is not conclusive. He puts his dictum on the ground that the clause was intended not to change, but to declare, the law. If it had been declaring the law, we would have been still under bondage to the badly decided House of Lords case of "Steele v. Mackinlay,"† under which Wallace could not have been held liable to the plaintiffs, and the manifest intention of the party would have been defeated as it

*21 S. C. R., 256.
†5 Ap. Ca. 754.

certainly was in "Steele v. Mackinlay." The dictum however, was a fortunate mistake, and has become a decision of the court in the later case of "Robinson v. Mann," the headnote of which is that under section 56 of the Bills of Exchange Act, (now section 131), a person who indorses a promissory note not indorsed by the payee, may be liable as an indorser to the latter. The learned Chief Justice delivered an oral judgment in which, after stating the points to be decided, the first of which was whether the respondent incurred any liability by indorsing a note not made payable to him, but to the Molson's Bank, and not indorsed by the payee, he proceeded as follows:

"As to the first point it appears that the note in question was in form as follows:

London, Sept. 25th, 1899.

$1,200.00.

Three months after date I promise to pay to the order of the Molsons Bank, at the Molsons Bank here, twelve hundred dollars for value received.

"W. MANN & CO."

"Indorsed on the back was the name "George T. Mann."

"Then the position was this: George T Mann, the present respondent, indorsed a note signed by W. Mann & Co., and payable to the Molsons Bank. It is contended that he was not an indorser and as such liable to the bank to whom the note so indorsed was delivered and by them discounted, Walter Mann receiving the proceeds.

"Next, what was the legal effect of this endorsement? Section 56 of the Bills of Exchange Act, 1890, provides that wh .e a person signs a bill otherwise than as a drawer or acceptor he thereby incurs the liability of an indorser to a holder in due course, and is subject to all the provisions of this Act respecting indorsers.

"Then when the bank took the note was it not entitled to the benefit of the respondent's liability as indorser? Certainly it was, for by force of the statute

*31 S. C. R., 484.

the indorsement operated as what has long been known in the French Commercial Law as an 'aval,' a form of liability which is now by the statute adopted in English law.

"The argument for the appellant as I understand it is that this indorsement at most amounted only to a guarantee, and that, there being no concideration expressed in writing, the statute of Frauds would have been an answer if the bank had sued the respondent. Some colour is given to this argument by the case of 'Sanger v. Elliott' as reported in 4 Times Law Reports, p. 524, but there the Bills of Exchange Act was not referred to and it appeared that the bill had not been negotiated. It is to be remarked that that case is not to be found in the regular series of reports. Here, however, the note was negotiated and the bank were holders in due course, and, consequently, the 56th section of the Act applies and creates a liability as indorser independently altogether of the principle of guarantee. If the section referred to is to have any effect it must apply in a case like this."

The reference here to the "aval" known in French commercial law is unhappy. It was this that helped Lord Blackburn to his unfortunate decision in "Steele v. Mackinlay," that the person so signing was not liable to any one already a party to the bill. Under this doctrine the defendant would not have been liable to the plaintiff in this case. The intentions of the parties would again have been frustrated. Happily they were not, and the principle has been established for us in Canada, that the statute means what it says, and that the person so anomalously signing is liable to the holder in due course. There is no more reason for qualifying the generality of this expression by tacitly adding the words "who was not already a party to the bill," than there was for adding the qualification which was so added by the Court of Appeal to the words of the statute in Vagliano's case (ante p. 2). The case of "Robinson v. Mann" has been followed in the Ontario Divisional Court in "Slater v. Laboree,"* by Meredith, C. J., MacMahon and Teetzell, JJ., and it is to be hoped that no

* 10 O. L. R., 648.

effort will be made here to reintroduce the rulings of the English courts on this question. They will be shown in the following note to be wrong.

English decisions on the liability of the anomalous indorser.—It has been stated in the preceding note that the Canadian decisions are not in conformity with the English decisions on this subject. In "Jenkins v. Coomber," Arthur Coomber accepted a bill drawn payable to their own order by J. Jenkins & Sons. The defendant, Alfred Coombes, wrote his name on the back for the purpose of guaranteeing the payment of the bill by the acceptor, who was his son, and who owed the money to the drawers. Wills, J., held that the Bills of Exchange Act, section 56 (the section now under consideration) had not overridden the decision in "Steele v. Mackinlay,"* and that it could not help the plaintiff in this case, because the plaintiff was not a holder in due course. He was not a holder in due course because such a holder was one who had taken a bill complete and regular on the face of it. "This was not on the face of it a regular and complete bill of exchange, since, when the defendant endorsed it the bill had not been indorsed by the plaintiffs to whose order it was payable." It does not seem correct to say that the bill was not on the face of it complete and regular because it had on the back an anomalous endorsement. The bill was as a bill complete and regular on the face of it. If the drawers had indorsed it it would have continued payable to them as holders, and the question would have arisen, what was the liability, if any, assumed by the anomalous indorser, the father of the acceptor, who had endorsed before it was endorsed by the payees? The logic of the decision seems to be that he could not have been made liable because, among other reasons, the bill was not complete and regular on the face of it when he indorsed it. The Canadian authorities would hold that he had incurred the liabilities of an endorser to a holder in due course, and that the plaintiffs were the holders in due course. Section 19 provides that a bill may be drawn payable to the order of the drawer. The drawers of the bill in this case were also payees and holders and no Canadian court

* 5 Ap. Cas., 754.

would now consider them disentitled because of the bill not being complete and regular on its face. The previous case of "Wilkinson v. Unwin,"* in England had decided that in a case such as that supposed, if Jenkins and sons had indorsed above Alfred Coomber, they could, as subsequent endorsees and holders, have sued Alfred Coomber on his endorsement, notwithstanding his appearing to be a prior indorser on the bill. It is not to be assumed that "Jenkins v. Coomber" was meant to overrule "Wilkinson v. Unwin," and the long line of cases on which it is founded, but merely to reaffirm the doctrine of "Steele v. Mackinlay," which is still law in England, but is no longer law in Canada.

Person signing in assumed name liable on bill.

132. Where a person signs a bill in a trade or assumed name he is liable thereon as if he had signed it in his own name.

Signature of firm name equivalent to signature by person so signing of persons liable as partners in firm.

(2) The signature of the name of a firm is equivalent to the signature by the person so signing, of the names of all persons liable as partners in that firm. 53 V., c. 33, s. 23. [E. s. 23.]

Assumed name.—A person may adopt any name that he pleases unless he infringes the rights of some other person by doing so. It is no uncommon thing for an individual to carry on business in a firm name in which his own proper name does not figure at all.

Firm name. Implied authority.—The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all the persons liable as partners in the firm. If he had their authority to sign, the instrument binds them. If not, they are not bound. In a trading co-partnership every partner is presumed to have the authority of his co-partners to sign the firm name as a party to an instrument drawn in connection with the business of the firm, but he cannot use the credit of the firm for the payment of his own private

*7 Q. B. D., 636.

debts. Mr. Ames has drawn a distinction* in this connection between the case where a member of a firm makes the firm note or acceptance payable to his individual creditor and the case where he makes it payable to himself and endorses it over to his individual creditor, saying that in the former case the creditor cannot hold the co-partners in the absence of actual authority, while in the latter case, as the individual might properly hold as his own the note of the firm payable to himself, and might properly endorse it away in payment of his individual debt, the creditor can hold the partnership in the absence of knowledge that the transaction in in fact unauthorized. The distinction is undoubtedly scientific, and there may be no more reason why the implied authority thus to deal should not be just as good as the payment of the private debt of the member with cash taken from the partnership till, which would certainly be binding upon the co-partners. But a contention based upon this doctrine was overruled by the Supreme Court of Nova Scotia, and the Supreme Court of Canada in "Creighton v. the Halifax Banking Company,"[27] (1890) where A., a member of the firm of A., B. & C., made a note in the firm name of A., B. & C., payable to another firm consisting of A. & B., and passed it in to the Halifax bank in reduction of an overdraft of the latter firm, the whole being done without the knowledge or consent of C. The Court held that C. was not liable. Such a note would be binding on the co-partnership if in the hands of a holder in due course. For example, if the Halifax Banking Company in the case cited, had rediscounted the bill with another bank, not having notice of the improper use that had been made of the name and credit of C., he would have been bound by the transaction.

No implied authority in member of non-trading firm. —The doctrine of the last paragraph does not apply to the case of a non-trading co-partnership. There is no implied authority of one partner in such a firm to bind his copartner by bills and notes. It was on this ground

* 2 *Ames Cases on B. & N.*, p. 869.
[27] 18 Sup. Ct. of Canada, 140; 22 N. S. R., 321.

that in "Foster v. Mackreth,"* it was held that the defendant, a member of a firm of attorneys, was not liable on a post-dated cheque issued in the name of the firm, although the authority to draw cheques was ample. The post-dated check was held to be equivalent to a bill of exchange which there was no implied authority from the other partners to issue. Mining partnerships, agricultural partnerships and commission agencies have also been held to be non-trading partnerships.

Endorser engages for acceptance and payment on due presentment and that if dishonoured he will compensate holder if requisite proceedings taken.

133. The endorser of a bill, by endorsing it,—

(a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonoured he will compensate the holder or a subsequent endorser who is compelled to pay it, if the requisite proceedings on dishonour are duly taken;

Precluded from denying to holder in due course genuineness and regularity of drawer's signature and all previous [redacted]

(b) is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous endorsements;

Precluded from denying to immediate or subsequent endorsee validity of bill at time of endorsement and the endorser's good title thereto.

(c) is precluded from denying to his immediate or a subsequent endorsee that the bill was, at the time of his endorsement, a valid and subsisting bill, and that he had then a good title thereto.† 53 V., c. 33, s. 55. [E. s. 55.]

Contract of Endorser.—It has already been seen (ante p. 241) that the endorser by the act of endorsing, both transfers a right to the endorsee and assumes a liability himself. The latter of these consequences does not always follow. The endorsement may be "without recourse," in which case no liability is assumed, or there may be a person without capacity to incur liability; for

* L. R., 2 Ex., 163 (1867.)

† The word "endorser" in this clause is obviously a misprint for "endorsee" and has been changed accordingly. See corresponding section of the English Act, s. 55 (c).

example, an infant, whose endorsement will nevertheless effect the transfer of the bill. The language of the section in its fulness is applicable only to an endorsement by one having full contractual capacity, and who endorses without limiting the liability that he would otherwise be assuming.

Liability of endorser to holder or subsequent endorser.—It is only to a subsequent endorser who is compelled to pay the bill that any endorser becomes liable by his indorsement,* and then only if the requisite proceedings have been taken. The rationale of the endorser's liability is very clearly explained by Brett, L. J., in "Horne v. Rouquette."[28] "All contracts raised upon the bill, it is seen, except those with the acceptor, are contracts of suretyship, that is to say are contracts of indemnity. Probably from this, though perhaps from other more strictly mercantile circumstances, as for the purpose of making other preparations or modifications in business, notice of dishonour is by the law merchant made a condition of the liability of the surety. The contracts of indorsement then between the immediate parties to them are conditional, and are by way of indemnity. It follows from this last that there can be no valid claim in respect of the indorsement where there is no liability in respect of it. And the two together are the reason why a failure by any indorsee to give due notice of dishonour, not only disables him from recovering from his immediate indorser, but disables a prior indorser to him from recovering against his indorser, or a prior indorser to him. The indorser who has failed to give notice cannot recover because he has not fulfilled the condition of his contract. The others cannot recover, because, as they cannot be made liable, they do not require to be indemnified. For example, the indorser to him who has failed to give due notice, is not liable to him, and therefore cannot claim against his own indorser; and therefore again such last indorser cannot claim against his indorser and so on." The learned judge then presents a suggested improvement upon Sir John Byle's description of the indorser's con-

* *i. e.* unless such endorser is the holder.
[28] 3 Q. B. D. at p. 518.

tract ,and proceeds: "With that definition the ultimate indorsee will, if he has given due notice or notices, recover, because, though he has given value for the bill, he has received no value on it. Any intermediate indorser will recover, if the notices are in order, because though he received value on the bill when he indorsed it he is made liable on the bill by having to indemnify his indorsee or a subsequent indorsee. But such intermediate indorser will not be liable if the notices are not in order, because he received value on the bill when he indorsed it, and is relieved from liability by defect of notices, and therefore is entitled to no indemnity."

Liability of endorser modified by agreement or by circumstances. Accommodation endorser.—The section states that the endorser engages that if the bill be dishonoured he will compensate the holder or a subsequent endorser who is compelled to pay. If his endorsement was given to accommodate the holder or such subsequent endorser, it goes without saying that he is not liable to the party so accommodated. This would be inferred even from the language of the section. He is only to "compensate" such holder or endorser. No compensation can be required if the accommodated party has merely been required to pay the amount of the bill, which he should do as between himself and the accommodating endorsers. See also the following note:

Same subject. Endorsers as co-sureties. Contribution.—An important case came before the Privy Council in 1883 which raised the question as to the rights and liabilities of endorsers "inter se," where they had endorsed for the purpose of becoming sureties to the bank for the amount of the bill. The headnote adequately states the principles that govern the question: "The liabilities 'inter se' of successive indorsers of a bill or note must, in the absence of all evidence to the contrary, be determined according to the ordinary principles of the law merchant, whereby a prior indorser must indemnity a subsequent one. But the whole circumstances attendant upon the making, issue and transfer-

ence of a bill or note may be legitimately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it either as makers or indorsers, and reasonable inferences derived from these facts and circumstances are admitted to the effect of qualifying, altering or even inverting the relative liabilities which the law merchant would otherwise assign to them. Where the directors of a company mutually agreed with each other to become sureties to the bank for the same debts of the company, and in pursuance of that agreement successively indorsed three promissory notes of the company; held, reversing the judgment of the court below, that they were entitled and liable to equal contribution 'inter se,' and were not liable to indemnify each other successively according to the priority of their indorsements."

Liability to subsequent indorser modified by circumstances.—In "Morris v. Walker,"* and "Wilders v. Stevens,"† a prior indorser, who was the holder of the bill or note (in one case it was a note and in the other a bill), was allowed to recover against a subsequent indorser, under circumstances which negatived the right of the subsequent indorser to have recourse to the prior indorser. It is in view of such cases that Mr. Ames, after saying that "no one but a payee or subsequent holder can be an indorser, adds, "There is, however, no insuperable difficulty in charging as indorser, one who puts his name on the back of a bill or note to give it credit with the payee. The payee or holder may obviously indorse the instrument to the surety without recourse, and may also fill up the blank indorsement of the surety to himself. In this way the parties are placed in the same position as if the maker had in the first instance delivered the note to the payee, the payee had then indorsed it without recourse to the surety, and the surety had then indorsed it to the payee as in "Wilders v. Stevens. In both cases the payee as second indorsee, charges the surity as second indorser." The surety cannot sue the payee as first indorser, because the instrument in the case put by Mr. Ames is without

* 15 Q. B., 588.
† 15 M. & W., 2 A.

recourse, and the same consequence follows if the payee, as in "Wilders v. Stevens," and "Morris v. Walker," is in a position to reply such facts as negative the right of the surety to have recourse to the payee.

The Ontario case of "Canadian Bank of Commerce v. Perram,"* is directly opposed to this; but is overruled by the case of "Robinson v. Mann."† It is doubtful if it was correctly decided, even assuming the law to be otherwise than it is now held to be in Canada with respect to the liabilities of an anomalous indorser. It was founded upon the English case of "Jenkins & Sons v. Coomber," which is commented on at page 359.

Endorser's estoppels.—It will be observed that the endorser warrants to every holder in due course, not merely the capacity of the drawer and of previous endorsers, but the genuineness and regularity in all respects of the drawer's signature and of all previous endorsements. The only other estoppel mentioned as to genuineness of signature is that by which the acceptor is precluded from denying the genuineness of the drawer's signature. All the other estoppels mentioned in these sections relate merely to the existence and capacity of the parties, and in the case of the acceptor, the estoppel is expressly stated not to apply to the question of the genuineness or validity of the indorsement. There are reasons for these distinctions.

Endorser's warranty of title to subsequent endorsee. — The endorser warrants to his immediate or a subsequent endorsee, (the word "endorser" being no doubt a misprint,) that the bill was at the time he endorsed it a valid and subsisting bill, and that he had then a good title thereto. Accordingly in "Thurgar v. Clarke,"[39] where a note was made in favor of two payees one only of whom endorsed it, and the endorsee under this defective endorsement again endorsed it, the last endorsee suing his immediate endorser could not be met with the contention that the plaintiff had no right to the bill for the want of a valid endorsement. Granting that the

* 31 O. R., 116.
† 31 S. C. R., 484.
39 4 N. B., 370.

plaintiff might not be able to sue the maker of the note for want of a valid title, and because the endorsement of one only of the two payees did not transfer the title, unless the payees were partners, this defence could not be set up in the present action. The dictum of Parker, C. J., is quoted from 7 Pick., Mass. 29, that the endorser always warrants the existence and validity of the contract which he undertakes to assign.

Same subject. Note made ultra vires by corporation.—It is not in terms stated in the section that the endorser is precluded from denying the capacity of the drawer or previous endorsers, nor is anything at all said as to his estoppels with respect to the acceptor or maker. But it is stated in effect that he warrants the instrument to be a valid and subsisting bill. Accordingly in "Merchants' Bank v. United Empire Club Co. et al,"[30] where the defendant endorsers were sued on their endorsement of a note made by the defendant company, they could not be heard to say that the note was ultra vires the company. "By their indorsement," said Osler, J., "they have in effect agreed with the plaintiffs, who upon this record must be taken to be holders for value and in good faith, to assume that the company had power to make the note in question, and they are estopped from asserting that the fact is otherwise."

Same subject. Drawer a married woman.—As stated in the last note, nothing is said in the section directly as to the warranty by the endorser of the capacity of the drawer or prior endorsers. But it was held by Robinson, C. J., in "Ross v. Dixie,"[31] where the defence of the endorser to an action on a bill of exchange was that the drawer was a married woman and incompetent to draw a bill, that "the defendant by indorsing the bill estopped himself from denying the capacity of the drawer to make the bill. He is in the position of a new maker, and cannot dispute either the signature of the drawer or his competence to draw the bill." Several

[30] 44 U. C. Q. B., 468.
[31] 7 U. C. Q. B., 414.

other cases are cited by Mr. Justice Maclaren[32] to the same effect.

Measure of damages (which are deemed liquidated) is

134. Where a bill is dishonoured, the measure of damages which shall be deemed to be liquidated damages shall be,—

Amount of bill.

(a) the amount of the bill;

Interest from presentment for payment if demand bill, other inst from maturity

(b) interest thereon from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill in any other case;

Expenses of noting.

(c) the expenses of noting and protest. 53 V., c. 33, s. 57. [E. s. 57.]

Holder may recover such damages from any party liable; drawer compelled to pay may recover from acceptor; and endorser so compelled may recover from acceptor, drawer or prior endorser.

135. In case of the dishonour of a bill the holder may recover from any party liable on the bill, the drawer who has been compelled to pay the bill may recover from the acceptor, and an endorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior endorser, the damages aforesaid. 53 V., c. 33, s. 57. [E. s. 57.]

In case of bill dishonoured abroad holder may recover from drawer or any endorser, and endorser compelled to pay may recover from any party liable on bill re-exchange with interest thereon.

136. In the case of a bill which has been dishonoured abroad in addition to the damages aforesaid, the holder may recover from the drawer or any endorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment. 53 V., c. 33, s. 57. [E. s. 57.]

Measure of Damages. Interest.—The interest that is made payable by the terms of the bill or note itself, is included in the clause marked (a). It is part of the "amount of the bill" and must be carefully distinguished from the interest payable as damages for non-performance of the contract to pay the bill or note,

[32] *Maclaren on Bills*, 3rd Ed., p. 303, 304.

which may not be at the same rate as the interest provided for by the terms of the bill. The latter will be governed by the agreement of the parties, or if the agreement, that is the document, is silent as to the rate, the rate of interest will be governed by the general law. This will depend upon circumstances. If the bill is drawn and payable in Canada the rate will be as provided by Revised Statutes of Canada, chapter 120, section 3, five per cent. If it is drawn out of Canada or drawn in Canada payable out of Canada, there will be a conflict of laws to be determined as provided by section 161, which is commented upon at the proper place. See also the note immediately following.

It is stated in one of Mr. Justice Maclaren's illustrations[33] that "where a bill or note is payable with interest at a certain rate, this rate governs after maturity," and several cases are cited to this effect, the last of which is, however, said by the learned author to be overruled by an illustration farther down the page, where it is said that a note for $3,000, payable six months after date, with interest at the rate of two per cent. per month until paid, "only bears interest at the legal rate of six per cent .after maturity," for which "St. John v. Rykert,"[34] is cited as authority. The whole question of interest is one on which the authorities are obscure and the cases have been conflicting. It will be necessary to examine them carefully, and an attempt is made to do this in the following notes.

Rate of interest where bill bears interest but no rate is named. Conflict of Laws.—Where the bill is by its terms payable with interest, but no rate is mentioned, the rate payable as part of the "amount of the bill" is determined by the proper law of the contract. This is the principle stated by Mr. Dicey.[35] He explains the rule thus: "If interest is payable on a debt or loan, it must be so under the contract between the parties. Whatever law, therefore, governs the contract must determine all questions relating to interest. The law of the

[33] *Maclaren on Bills*, 3rd. Ed., 313.
[34] 10 S. C. C., 278.
[35] *Dicey on Confl. of Laws*, 616.

contract will indeed in general be the law of the country where the debt is to be paid or the loan repaid." The learned author then quotes Story (s. 291) as follows: "The general rule is that interest is to be paid on contracts according to the law of the place where they are to be performed; in all cases where interest is expressly or impliedly to be paid. . . . Thus a note made in Canada, where interest is six per cent., payable with interest in England, where it is five per cent., bears English interest only." At another page, the learned author refers to a confusing element that has been imported into the problem by the language used in the sections dealing with conflict of laws. It is enacted by section 161 that, subject to the provisions of the act, the interpretation of the drawing, endorsement, acceptance or acceptance supra protest of a bill drawn in one country and negotiated, accepted or payable in another, is determined by the law of the place where the contract is made. Chalmers says that the term "interpretation in this sub-section, it is submitted, clearly includes the obligations of the parties as deduced from such interpretation.* The statement just now cited from Dicey is not in accordance with this section as interpreted by Chalmers. That interpretation would require us to hold that a note made in Canada and payable in another country where the rate of interest was different would bear interest at the Canadian rate and not at the rate payable in the other country. It is to be noted here that the cases cited by Dicey are not cases relating to the interpretation of the acceptor's or maker's contract. They are cases relating to the damages to be recoverable on breach of the contract. It may well be that these damages are to be governed by the law of the place where the money is payable, while the interpretation of the acceptor's contract to pay, including in that term the extent of the obligation that he assumes, is governed by the law of the place where the contract is made. That is to say, if a note were made in Canada as in the cases supposed by Dicey, the interest there being six per cent., and the note were payable in England with interest, the rate payable would possibly, according to

* *Chalmers on Bills*, 6th Ed., p. 244.

the literal reading of the Bills of Exchange Act, be the Canadian rate of six per cent., and not as Dicey says, the English rate of five per cent. But this is all that necessarily follows even from the literal reading of the act. The rate recoverable "ex mora," as damages, might still be governed by the principles of private international law, and would be, as Dicey says, the rate at the place of payment. The observations of Mr. Dicey at pages 606 and 607 should be carefully read in this connection. They seem to show that the draftsman of the Bills of Exchange Act may have introduced confusion into the subject by the terms in which section 161 is drawn. See further, note p. 372.

Rate payable as damages for non-payment at maturity.—In the English case of "Keene v. Keene,"[36] in 1857, where a bill was drawn with interest at ten per cent. per annum, it was held that the drawer was liable on default of the acceptor for interest at ten per cent. after the maturity of the note and notice of dishonour. That is, it was held that the master had done right in giving in the shape of damages the rate of interest that the parties themselves had contracted for. This decision was followed in a number of cases in the common pleas in Ontario, which are given by Mr. Justice Maclaren in his illustrations.* But in "Cook v. Fowler,"[37] in the House of Lords, it was said by Lord Selborne in effect that there was no rule of law that, upon a contract for payment of money on a day certain, with interest at a fixed rate down to that day, a farther contract for the continuance of the same rate of interest was to be implied. The rate to which the parties had agreed during the terms of their contract might well, he said be adopted in an ordinary case of this kind by a court or jury as a proper measure of damages for the subsequent delay, but that was because ordinarily a reasonable and usual rate of interest, which it might be presumed would have been the same whatever might be the duration of the loan, had been agreed to. But in the case then before the House of Lords the agreed rate was, he said, excessive

[36] 3 C. B. N. S., 144.
* *Maclaren on Bills*, 3rd. Ed., 313.
[37] L. R., 7 H. L., 27.

and extraordinary, and no court or judge could have adopted it without a very great miscarriage of justice. Such miscarriages of justice undoubtedly occurred in the Ontario Common Pleas in following the ruling in "Keene v. Keene." In "St. John v. Rykert,"[38] a note for $3,000 was payable with interest "at the rate of two per cent. per month until paid," and a mortgage was given of the same date as the note and as collateral to it, wherein the mortgagor covenanted to pay the said sum of $3,000 on the 11th of July, with interest thereon at the rate of twenty-four per cent. per annum until paid. It was held that the proper construction of the terms both of the note and the covenant as to payment of interest was that interest at the rate of twenty-four per cent. should be paid up to the 11th of July, and not that interest should be paid at that rate after such day if the principal should then remain unpaid. This case was followed in the later case of "The People's Loan and Deposit Co. v. Grant,"[39] in which Strong, C. J., referring to it said: "In 'St. John v. Rykert,' it was held that upon a promissory note by which interest was reserved at the rate of 24 per cent. per annum till paid, interest at the rate so reserved was not recoverable by way of damages after the day of payment, and that from that time interest could only be recovered at the rate of six per cent. per annum." In this case Sir William Ritchie also referred to the general rule that interest, by way of damages, should be the statutory rate of interest. It does not necessarily follow that it would be legal error for the jury to assess a higher or a lower rate, but it will probably be held, whenever the question arises, that this is the proper measure of damages in all cases.

It must be borne in mind, however, that this paragraph does not deal in any way with the questions that arise out of the conflict of laws where the bill is drawn in one country and endorsed or payable in a different country. The considerations governing such questions are discussed in another note.

Same question as affected by conflict of laws.—In "Cooper v. Waldegrave,"[40] the bill was made in France

[38] 10 S. C. C., 278.
[39] 18 S. C. C., 262.
[40] 2 *Beavan*, 282.

and accepted in France payable in England, and the question that arose was as to the rate of interest properly chargeable as damages for the acceptor's failure to pay at maturity. The Master of the Rolls said: "The contract of the acceptor, which alone is now to be considered, is to pay in England; the non-payment of the money when the bill becomes due, is a breach in England of the contract which was to be performed in England. Upon the breach the right to damages or interest immediately accrues; interest is given as compensation for the non-payment in England, and for the delay of payment suffered in England; and I think that the law of England, i. e. the law of the place where the default has happened, must govern the allowance of interest which arises out of that default." The logic of this reasoning seems unassailable.

Same subject. Rate payable by drawer or indorser. Conflict of laws.—In the case cited in the last paragraph the Master of the Rolls said: "At the time when there is a breach of the contract of the acceptor by non-payment in the country where payment is contracted to be made, there may be a contemporaneous breach of contract by the drawer or indorser in the country where the contract was entered into, where the bill was drawn and (or) the indorsement made, and the consequences of that breach of contract may be governed by the law of the country where it takes place."[41] In a note to "Gibbs v. Fremont," in 9th Exchequer Reports,[42] it is said that it has been authoritatively held that the contract of the parties secondarily liable for the payment of a bill or note is to be construed as an alternative contract to pay the instrument at the place where they enter into the contract in case it be not paid by the parties primarily liable for its payment at the place where it is "prima facie" payable, and that interest must be computed against the drawer of a bill or the endorser of a note according to the lex loci contractus, without reference to the lex loci solutionis. But if the obligation of the drawer or indorser is to pay at the place where he enters

[41] *Cooper v. Waldegrave.* 2 Beav., 282.
[42] 9 Exch. (Am. Ed.) 23.

into the contract, the lex loci contractus and the lex loci solutionis are in a sense one and the same. The only question that can be made is the one left open in "Gibbs v. Fremont," whether the contract of the indorser is a new drawing at the place where he draws, so as to carry interest as payable at that place, or is a new drawing at the place where the bill is drawn so as to carry interest at the rate payable at the latter place. The answer to this would seem to be that the latter is not the lex loci contractus of the indorser, nor is it the lex loci solutionis of his contract in any possible sense. He has either undertaken to pay at the place where he indorsed, or at the place where the bill is payable. The editor's note already referred to would seem to say that his undertaking is to pay at the place where he indorsed and that is, according to the note, both the lex loci contractus and the lex loci solutionis. In "Gibbs v. Fremont,"[43] it was held that where a note was drawn in California upon a drawee in Washington and accepted there, the rate of interest payable by the drawer on the acceptor's default was governed by the lex loci contractus, and that the California rate must govern and not the rate at the place where the bill was payable. The same principle was laid down by the Judicial Committee of the Privy Council in "Allen v. Kemble,"[44] but Lord Cockburn, in "Rouquette v. Overman,"[45] said that this was not the point really in judgment in the case in the Privy Council, and he treated the ruling as an "obiter dictum." In the case last mentioned, the question before the court was not as to the rights and liabilities of the endorser and endorsee in regard to damages on non-payment of the bill, but as to the time of presentment for payment and notice of dishonour, which were held to be governed by the law of France where the bill was payable, and not by the law of England where it was drawn and endorsed. While, therefore, the cases of "Gibbs v. Fremont," and "Allen v. Kemble," seem to be discredited by the decision in "Rouquette v. Overman," they are not necessarily overruled. The comment of Mr. Ames on these cases is as follows: "It is held in

[43] 9 Exch., 25.
[44] 8 Moo., P. C., 314.
[45] L. R., 10 Q. C., 540.

many jurisdictions that interest is to be computed according to the rate which prevails at the place of residence or business of the drawer or indorser, ('Gibbs v. Fremont'; ex parte Heidelback,) while in others the rate of the place where the instrument is payable by the drawee or maker is treated as the basis of computation, ('Rouquette v. Overman.') This conflict of authority, it is conceived, has arisen from a failure to make a necessary distinction between interest payable by a drawer or indorser in fulfilment of his contract of indemnity, and interest payable by a drawer or indorser by way of damages for the non-fulfilment of his contract of indemnity. The first runs from the dishonor of the instrument to the time when it should, according to mercantile custom, be presented to the drawer or indorser, and ought to be computed at the rate prevailing at the place of dishonor. (See 'Suse v. Pompe.') The second runs only from the presentment of the instrument to the drawer or indorser and is to be computed according to the rate prevailing at the place where the contract of the drawer or indorser is to be performed." The distinction here drawn is acute and logical. The drawer or endorser, by his contract of drawing or endorsement, undertakes that if the bill is not paid at maturity he will indemnify the holder on receiving notice. The amount which will indemnify the holder is the amount payable on the bill with interest at the rate where the bill is payable until it is paid. But the drawer or endorser has contracted to pay this indemnity at the place where he drew or endorsed the bill, and if he fails to fulfil this obligation the interest payable should be governed by the lex loci solutionis, the place where he drew or endorsed it as the case may be.

Re-exchange.—Mr. Ames says: "When the place of payment by the drawer or indorser is different from that at which the instrument should have been honored by the drawee or maker, the amount of the drawer's or indorser's obligation is measured according to the principle of re-exchange. The holder is supposed to draw at the place of dishonor upon the drawer or indorser at the place of each, respectively, a cross-bill, payable at sight for so much money as will enable him to negotiate

the bill for an amount equal to what he should have received at the maturity of the original bill, together with notarial fees, interest, and the expenses incident to the negotiation of the cross-bill. If this cross-bill is honored on presentment the drawer or indorser fully discharges his contract of indemnity. If the cross-bill is not honored upon presentment, the holder may bring an action against the drawer or indorser upon the original bill, in which action he will be entitled to recover the amount of the cross-bill and interest thereon from the time of dishonor of the cross-bill and at the rate of the place where the bill was payable. In England and the United States the cross-bill is not as rule actually drawn, but simply serves as the measure of the drawer's or indorser's obligation ('Suse v. Pompe,'[46] 'Mellish v. Simon,[47] 'Ward v. Kelso.'[48]"

Difference between English and Canadian Act.—The meaning of the term, "re-exchange," in the Canadian act will be found to differ from its meaning in the English act. The latter provides that in the case of a bill dishonoured abroad the holder may recover in lieu of the damages provided for in the sections preceding the one in which the provision for re-exchange is made, the amount of the re-exchange with interest. The Canadian act provides for the recovery of re-exchange in addition to the damages provided for in the preceding sections. The change of phrase leaves room for a verbal criticism of Mr. Justice Maclaren's definition of the term re-exchange as used in the Canadian act,* but it cannot be supposed that there was any intention to make the law different here from the law that governs the matter in England.

No percentage allowed.—Mr. Justice Maclaren says:* "It will be observed that the present act does not recognize or allow the further damages formerly allowed on bills drawn or negotiated in Canada, and dishonored by

[46] 30 L. J. C P. 75.
[47] 2 *H Black*. 37.
[48] 27 Term.. 241.
* See *Maclaren on Bills*. 3rd Ed., p. 314
* *Maclaren on Bills*, 3rd Ed., p. 314.

non-payment abroad. In the various provinces there was allowed a percentage from ten per cent. downwards. By the Dominion act of 1875, embodied in R. S. C., c. 123, s. 6, it was abolished for any part of Canada or Newfoundland and reduced to two-and-a-half per cent. for other countries. See 'Foster v. Bowes,' 2 U. C. P. R., 256 (1857); 'Bank of Montreal v. Harrison,' 4 U. C. P. R. 331 (1868)."

Holder of bill to bearer who negotiates by delivery is transferrer by delivery.

137. Where the holder of a bill payable to bearer negotiates it by delivery without endorsing it, he is called a "transferrer by delivery."

He is not liable on instrument.

(2) A transferrer by delivery is not liable on the instrument. 53 V., c. 33, s. 58. (E., s. 58.)

He warrants to immediate transferee holding for value.

138. A transferrer by delivery who negotiates a bill thereby warrants to his immediate transferee, being a holder for value,—

That bill is as purporting.

(a) that the bill is what it purports to be;

Right to transfer.

(b) that he has a right to transfer it; and,

That he is not aware of fact rendering it valueless.

(c) that at the time of transfer he is not aware of any fact which renders it valueless. 53 V., c. 33, s. 58. (E. s. 58).

Cross reference. Bill payable to bearer.—This expression is defined in section 21, ss. 3. Such a bill is one which is expressed to be so payable, or on which the only or the last indorsement is an indorsement in blank. Ante p. 81.

Transferrer by delivery not liable on the bill.—This was decided as long ago as 1789 in ex parte Roberts,[49] and in the following year the principle was carried to its logical conclusion in "Fenn v. Harrison,"[50] in which the holder desired one, F. Heret, to procure the discount of a bill of exchange but positively refused to indorse it, and Heret delivered it to his brother for the same pur-

[49] 2 *Cox*, 171

[50] 3 T. R., 757.

pose, informing him to whom it belonged. The brother, finding that he could not dispose of it without indorsing it, was prevailed upon to do so by F. Heret telling him that he would indemnify him, but the indorsee took it upon the faith of the names on the bill without any knowledge of the real owner. The latter, the original holder of the bill, afterwards promised to pay it but it was held that such promise would not support an action by the indorsee against him. It was mere "nudum pactum," because F. Heret was a special agent under a limited authority and could not bind his principal by any act beyond the scope of that authority. Lord Kenyon thought it a case of considerable nicety, but the other judges found no difficulty. It was, they thought, an attempt to establish a new sort of liability that would be very dangerous for persons dealing with negotiable instruments.

Transferrer by delivery not generally liable on the consideration for the transfer.—As was said by the Lord Chancellor in ex parte Roberts,[51] "a man who discounts a bill is a purchaser of it and no contract arises between him and the person from whom he takes it collateral to the bill. * * * If there be no indorsement by the party, the discounter must do what he can with the bill but has no remedy against the party who brought it to him." But there are cases where the transferee of the bill may, on the dishonour of the bill, fall back on the consideration for the transfer. These will be considered in the following notes.

Where transferrer knows the bill is worthless.—This exception has been embodied in the act in the form of a warranty that the transferrer is not at the time of the transfer aware of any fact that renders it valueless. Lord Kenyon said, in "Fenn v. Harrison,"[52] "it is extremely clear that if the holder of a bill of exchange send it to market without indorsing his name upon it, neither morality nor the laws of this country will compel him to refund the money for which he has sold it, if he did not

[51] 2 *Cox*, 171.
[52] 3 T. R., 759.

know at the time that it was not a good bill. If he knew the bill to be bad it would be like sending out a counterfeit into circulation to impose upon the world instead of the current coin. In this case, therefore, if the defendants had known the bill to be bad there is no doubt but that they would have been obliged to refund the money." It will be noticed that the statute places the right of the holder in such a case on the basis of a warranty, and in "Read v. Hutchinson,"[53] where wine was sold to be paid for by a bill of exchange without recourse on the buyer in case of its not being paid, and the plaintiff's case was that the buyer knew the bill was worthless, it was held that there could be no recovery for the price of the goods sold. The plaintiff should have brought trover or an action of deceit. But this is possibly too strict a ruling for the present day. In other cases of warranty referred to in the section, for example, the warranty of genuineness, the plaintiff has been held entitled to recover the money paid on the bill as money had and received to the use of the plaintiff.

Transfer of bill for an antecedent debt.—If the bill was given for an antecedent debt it is said by Mr. Justice Maclaren that the transferrer is liable on the consideration. If the instrument is accepted in discharge of the antecedent debt it is difficult to see why any liability should remain but Chalmers says* "that the transferor is not liable on the consideration in respect of which he has transferred the bill unless the bill was given in respect of an antecedent debt, or it appears that the transfer was not intended to operate in full and complete discharge of such liability."

To the same effect is Mr. Justice Maclaren's note, but the truth is that both authors are a little obscure in their comments on this subject. In one of the cases cited by both authors, "Camidge v. Allenby,"[54] the vendee of goods purchased on the morning of the 10th of December, delivered to the vendor the promissory notes of a bank, payable on demand. The notes were so delivered

[53] 3 *Camp*, 351 (1813)
* *Chalmers on Bills*, 6th Ed., 198.
[54] 6 B & C., 392. See also 2 *Ames*, 572n

at two o'clock in the afternoon. Unknown to both parties the bank had suspended payment at eleven o'clock in the morning, some hours before the delivery of the notes. The vendor never circulated the notes or presented them for payment, but seven days later demanded payment from the vendee. It was held that he had by his laches made the notes his own. A distinction seems to have been drawn between notes given on the making of the sale and notes given as these were for the antecedent debt arising out of the sale in the forenoon. Bayley, J., said that "if the notes had been given to the plaintiff when the cow was sold, he could have had no remedy upon them against the defendant. The plaintiff might have insisted upon payment in money. But if he consented to receive the notes as money they would have been taken by him at his peril." He proceeds to say that this would not follow if the defendant had had knowledge of the banker's insolvency and then deals with the case before the court of an antecedent sale, followed by the delivery of a negotiable note, which operates as a discharge of the debt unless the holder does all that the law requires to be done to obtain payment. The notes in question were meant for circulation and should have been either circulated or presented for payment. The plaintiff had done neither and although the bank had previously suspended the defendant had a right to timely notice of non-payment of the notes so that he might do what he could to protect himself.

Same subject. Bank note delivered as payment.— In the case cited in the last paragraph it was a banker's note that was delivered. Bayley, J., evidently considered that if it had been taken at the time of the sale it would have been a payment unless the payer knew that the banker was insolvent. Even when taken for an antecedent debt it was held to be a payment, but Bayley, J., so held because the holder had been guilty of laches in not circulating or presenting the note. It is pointed out by Bramwell, B., in the later case of "Guardians of Lichfield Union v. Greene,"[35] that the other judges did not follow in exactly the line pursued by Bayley, J. They

[35] 1 H. & N., 889.

seem to have gone farther. Holroyd, J., said, "the notes were paid by the defendant and received by the plaintiff as money, and having been paid and received as money, and both parties being innocent, and the notes being what they imported to be, it seems to me that they must, according to the case of "Miller v. Race," 1 Burr. 452 operate as payment." It is true the learned judge follows this with a reference to the plaintiff's laches, and Littledale, J., also refers to this circumstance but closes his opinion by saying that he thinks "there is no guarantee implied by law in the party passing a note payable on demand to bearer that the maker of the note is solvent at the time when it is so passed," from which it would seem to follow that the note so accepted would be an absolute payment. The bank note is of course a payment even of an antecedent debt if the holder is guilty of laches, but the question is whether, even apart from laches, the party who takes a bank note in payment of a debt can return the note on discovering that the banker is insolvent. The answer to this question does not seem to be definitely given in any of the English cases, but in "Ontario Bank v. Lightbody,"[56] it was held that payment in bills of an insolvent bank is not a satisfaction of a debt, although at the time and place of payment the bills are in full credit and the parties are wholly ignorant of such insolvency if the bank was in fact insolvent previous to such payment."*

Bank note given for antecedent debt.—Chalmers after stating that the transferor by delivery is not liable on the consideration in respect of which he has transferred the bill if the bill be dishonored, unless the bill was given in respect of an antecedent debt, expresses a doubt in the foot-note whether this exception now applies to bank notes, basing his doubt apparently on the case last mentioned of "Guardians of Lichfield v. Greene."[57] Lord Bramwell's reasoning in this case (then Bramwell B.), certainly tends in the direction pointed to in Judge Chalmers' doubt. If a bank note is money,

[56] 13 *Wendell*, 101.
* See cases to the contrary cited in note to *Timmins* v. *Gibbons*, 18 Q. B., 727, Am. Ed. (Phila.)
[57] 26 L. J., Ex. at p. 142, 1 H. & N., 889.

as "Miller v. Race,"[58] decided, and if there is no guarantee that the maker is solvent at the time when the note is transferred, as Mr. Justice Littledale said in the case of "Camidge v. Allenby,"[59] it is difficult to see how the transferee can have any claim against the transferor on the consideration for the transfer, and this is the conclusion arrived at by Mr. Daniel, who cites at length a well reasoned judgment of Gibson, J., in "Bayard v. Shenck."[61] But Mr. Daniel says that in England the view taken is that if the bank be insolvent at the time of the transfer, the loss is upon the transferrer; but the transferee must, in order to recover, present the notes at the bank immediately or pass them off in circulation." The cases cited of "Owenson v. Morse,"[62] and "Williams v. Smith,"* abundantly support his statement and make it clear that the bank notes of a bank which at the time of the transfer of them is insolvent do not operate as payment either of an antecedent debt or for a consideration concurrent with the transfer. A fortiori it must be true as Mr. Justice Maclaren says[63] that were a person changes bank notes to oblige the holder he can recover back the money if the bank has stopped payment, provided he acts with diligence.

Transferee must use diligence. Note of a bank which suspends payment.—Both Chalmers and Maclaren agree that the "transferee by delivery" must use diligence if he wishes to hold the transferor liable. The cases cited in the last paragraph illustrate this rule, and the case of "Camidge v. Allenby" seems to show that it would be no answer to this requirement to prove that the bank was insolvent at the time the notes were taken.

Discharge of Bill.

Bill discharged by payment in due course on drawee's or acceptor's behalf.

139. A bill is discharged by payment in due course by or on behalf of the drawee or acceptor.

[58] 1 *Burr.*, 452.
[59] 6 B & C., 373.
[60] *Daniel on Neg. Inst.*, 5th Ed., Sec. 1677.
[61] 1 *Watts* V. S., 92.
[62] 7 T. R., 64.
* 2 B & Ald. 500.
[63] *Maclaren on B.*, 3rd Ed., 316.

Due course means at or after maturity to holder in good faith without knowledge of defective title.

(2) Payment in due course means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective.

Accommodation bill discharged by payment by accommodated party.

(3) Where an accommodation bill is paid in due course by the party accommodated, the bill is discharged. 53 V., c. 33, s. 59. (E. s. 59.)

Otherwise payment by drawer or indorser does not discharge bill.

140. Subject to the provisions aforesaid as to an accommodation bill, when a bill is paid by the drawer or an endorser, it is not discharged; but,—

Where bill payable to third party drawer paying may not re-issue.

(a) where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill;

Otherwise where payable to drawers order.

(b) where a bill is paid by an endorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent endorsements, and again negotiate the bill. 53 V., c. 33, s. 59. (E. s. 59.)

Acceptor becoming holder in his own right at or after maturity discharges bill.

141. When the acceptor of a bill is or becomes the holder of it, at or after the maturity in his own right, the bill is discharged. 53 V., c. 33, s. 60. E. s. 61.

Discharge of the bill. Distinction between this and discharge of a party or parties to the bill.—The discharge of the bill implies that it has ceased to be a negotiable instrument and that all rights of action on the bill are extinguished. The term extinguishment is the one used by Mr. Ames in this connection. It seems sufficiently apt and expressive, but Lord Esher, M. R., said in "Glasscock v. Balls,"[64] that he could not understand the meaning of the term "extinguishment" which had been

[64] 24 Q. B. D., 16.

used by counsel in the argument. He had never heard of a plea of extinguishment of a bill or note. The statute uses the term discharge, and the foregoing sections deal with discharge by payment, or by the right to recover and the obligation to pay becoming vested at maturity in the same person. Other modes of discharge are mentioned in a following section, such as discharge of the bill by renunciation, by cancellation, by material alteration. Chalmers points out that the discharge of the bill and thereby of all rights of action upon the bill, does not necessarily affect the rights of action arising out of the bill transaction. The illustration he gives is the case of one of three joint acceptors paying the bill which is thereby discharged if the payment is made at maturity of the bill, though he does not mention this qualification, at least in this place. Notwithstanding the discharge of the bill in such a case, the acceptor so paying the bill has a right of contribution against his co-acceptors. Section 139 enacts that payment by the acceptor discharges the bill, but if he is an acceptor for the accommodation of some other person he has a right of action, not on the bill, but for indemnity. The discharge of the bill must also, as Chalmers points out, be distinguished from the discharge of one or more of the parties liable on the bill, the examples given being the discharge of an acceptor in bankruptcy, or of a drawer or indorser for want of notice. So also an indorser may be discharged as regards a particular party without being discharged as regards subsequent parties.

Payment.—The meaning of this term is not defined and as Chalmers says it is not a technical word, for which he cites the words of Maule, J., in "Maillard v. Argyle,"[65] 'payment is not a technical word. It has been imported into law proceedings from the exchange, and not from law treatises." It imports that the obligation of the promisor has in some way been satisfied. No difficulty can arise from the want of any more precise definition. The holder at maturity must in some way be satisfied and the obligation of the promisor to him as holder thus discharged in order to effect

[65] 6 M. & G. at 45.

the extinguishment of the bill, that is to prevent it being further negotiated or re-issued as a bill." Illustrations of payment by transactions other than the payment of cash are given in Mr. Chalmer's foot-note,[66] such as "an agreement to set-off another debt," although the plea in that case was bad for want of an averment that the note was overdue when transferred.[67] "A negotiable bill for a smaller amount," may be a good payment of a larger amount if received as such, but when such a note is set up as payment of another note the considerations set forth, ante p. 195, must be taken into account. "Agreement to suspend" the right of action is also mentioned, as to which it is to be remarked that the agreement in the case referred to was construed not as an agreement that suspended the right of action but merely an agreement subjecting to damages the party agreeing in the event of his suing contrary to the agreement. Such an agreement, one would say, would never be regarded as discharging the bill.

Merger.—"Merger" is also mentioned, but in the case cited where one of two makers of a joint and several promissory note gave the holder a deed of mortgage to secure the amount with a covenant to pay it, it was held that the other maker was not discharged, because the remedy on the mortgage was not co-extensive with the remedy on the note.

Bill of third party taken as payment.—This would no doubt be a payment of the bill if so given and accepted, but whether it is or is not an absolute payment depends upon the considerations discussed, ante p. 195.

Payment in bonds, &c.—The case cited by Mr. Chalmers, "Schroder's case,"[68] shows that bonds could be taken and accepted by directors under the circumstances of that case in payment for shares. So of course the holder could agree to accept bonds in payment, just as he could accept uncurrent coin, or currency not legal tender, or goods, and as already stated, anything

[66] *Chalmers on Bills*, 6th Ed. 203, note 3.
[67] *Cripps* v. *Davis*, 12 M. & W., 159.
[68] 11 Eq., 131.

accepted in payment at maturity by the holder would discharge the bill.

Taking debtor in execution.—A note on this subject will be found among the notes and queries at the end of the volume.

Payment, when is it complete?—Mr. Chalmers says that payment by a banker to a private individual is complete and the property in the money passes to the payee when money is laid on the counter; for which "Chambers v. Miller,"[69] is cited.

Part payment by acceptor. The same by drawer.—It is said by Chalmers that part payment of a bill in due course operates as a discharge "pro tanto." *Of course it must be the case that if the acceptor or any other party who is really the principal debtor, an accommodated drawer for instance, pays part of the bill at maturity, the holder cannot recover from the acceptor more than the balance. This is laid down by Willes, J., in "Cook v. Lister,"[70] on the authority of Byles on Bills. But in the judgment of Erle, C. J., another passage is quoted from the same author as follows: "The acceptor being the principal and the drawer the surety, it might seem that a payment by the drawer discharges the acceptor's liability to the holder "pro tanto," and makes the acceptor liable to the drawer for money paid to his use; and that if the drawer pay the whole bill nominal damages only can be recovered by the holder of the acceptor. The better opinion, however, seems to be that, to an action against the acceptor, payment by the drawer is no plea, but only converts the holder into a trustee for the drawer, when the holder afterwards recovers against the acceptor."

It will be seen in one of the following notes that payment in full at maturity by the drawer, if the bill was for his accommodation, is a complete discharge of the bill: but a partial payment by the drawer, the holder still

[69] 32 L. J. C. P., 30.
* *Chalmers on Bills*, 6th Ed., p. 204.
[70] 32 L. J. C. P. at 125.

retaining the bill does not disentitle the holder to sue for the full amount of the bill even if the drawer is the party really liable. A fortiori, if he is merely in fact a surety as he is always presumptively. And the same thing is true of payment by the indorser. See "Thornton v. Maynard."[71]

Payment to discharge bill must be to holder.—The payment will not discharge the bill unless made to the holder or to some person authorized to receive payment on his behalf. The person in possession of a bill payable to bearer is the holder and hence if such a bill be stolen and presented for payment at maturity by the thief, the payment by the acceptor will discharge him. But where a bill is payable to order no title can be made without the indorsement of the payee. A forged indorsement does not transfer the title. The statute declares it wholly inoperative. (See ante p. 154.) And in one of the decided cases where a bill was payable to Henry Davis, or order, and got into the hands of a Henry Davis other than the one in whose favor it was drawn, it was held, against Lord Kenyon's ruling at "nisi prius' and dissenting opinion in banco, that the plaintiff could not recover on the bill without the indorsement of the Henry Davis to whom the bill had been made payable.[*]

A bill obtained by fraud stands on a different footing. The fraud may entitle the true owner to become possessed of the bill, but until he does so the fraudulent holder is nevertheless the holder, and payment to him in due course discharges the acceptor.

Holder's indentity.—The consequence of a wrong payment being such as described in the preceding note, the dictum of Maule, J., in "Robarts v. Tucker,"[72] that the payer would be allowed a reasonable time to make inquiry as to the identity of the person presenting the bill for payment with the holder of the bill, seems correct, but Chalmers thinks this very questionable, having regard to the duties of the holder, and says that if the payer

[71] L. R., 10 C. P., 695.
[*] *Mead* v. *Young*, 4 T. R., 1790.
[72] 16 Q. B. at 578.

doubts the identity of the person presenting the bill or the genuineness of the instrument he must pay or refuse payment at his risk.*

Payment by a stranger for some collateral purpose of his own is neither a payment by acceptor nor for honor.—A bill for £150 was payable at bankers. A stranger came to the bank and, by arrangement with the banker, paid in the amount of the bill on condition that it should be given up to him, which was done. The receipt of the amount and the payment of the bill were entered in acceptor's account at the bank. It turned out that the stranger was a party who had indorsed the bill and discounted it at the Bank of England, improperly, the bill having been handed to him for the purpose of presentment. It was held that the bill had not been paid by the indorser on account of the acceptors, but the payment was a mere private transaction between the stranger and the bankers.†

Payment before maturity does not extinguish the bill.—The act is express to the effect that the payment which will discharge the bill must be a payment at or after maturity. In "Morley v. Culverwell,"[73] the drawer of a bill of exchange, before it became due, agreed with the acceptor that on his giving a certain mortgage security for the amount he, the drawer, should deliver up to him the bill of exchange as discharged and fully satisfied. The acceptor accordingly executed the mortgage and received back the bill uncancelled. The drawer was afterwards sued on the bill and he pleaded these facts. Parke, B., said: "I am of opinion that nothing will discharge the acceptor or the drawer, except payment according to the law merchant,—that is, payment of the bill at maturity; if a party pays it before, he purchases it, and is in the same situation as if he had discounted. The rule is laid down correctly by Lord Ellenborough in 'Burbridge v. Manners,' that a payment before a bill becomes due does not extinguish it any more than if it were merely discounted, and that 'payment' means pay-

* *Chalmers on Bills*, 6th Ed., 206.
† *Deacon, Stodhart*, 2 M. & G., 317.
[73] 11 M. & W., 174.

ment in due course and not by anticipation." In "Attenborough v. McKenzie,"[74] the defendant got his debtor, Tingay, to accept a bill for £400 and gave it to one, Score, to get it discounted. Score took the bill to Barton for the purpose of having him discount it and Barton took it to Tingay and got from him £375, which was offered to and accepted by the defendant, who said he took it because the bill was in Tingay's hands and he was thereby discharged. But it did not appear that this was communicated to Tingay. Before the bill was due Tingay transferred it to Robert Attenborough on discount and after it was due it came to the plaintiff. In the course of the argument, counsel contended that payment by the acceptor discharged the drawer. Pollock, C. B.; "Payment in due course, and payment 'as payment.' In this case, the money was paid before the bill was due and by way of discount, not payment." In giving judgment, he said: "When a bill has been created according to the custom of merchants as a real commercial transaction, it is part of the general circulating medium of the country; and the acceptor, after its issue, stands with regard to a re-transfer of it to him in the same position as any other person. He may indeed pay it to discharge it, but discounting is not paying it, and if he discounts it he may re-issue it. Nothing will discharge the drawer but payment according to the law merchant. That is the doctrine of "Morley v. Culverwell." Here the bill was not satisfied.

Payment in order to extinguish the bill must be by drawee, acceptor or accomodated party.—In "Callow v. Lawrence,"[75] Lord Ellenborough said: "A bill of exchange is negotiable 'ad infinitum' until it has been paid by or discharged on behalf of the acceptor." But the party primarily liable in fact may not be the acceptor. If the acceptance is an accommodation acceptance, the bill should be paid by the person accommodated, and if the acceptor pays it he has a right to recover the amount from the person for whose accommodation he accepted

[74] 52 L. J. Ex., 244.
[75] 3 M. & S., 95.

it. In "Lazarus v. Cowie,"[76] Lord Denman, C. J., said: "The drawer of an accommodation bill is in the same situation as the acceptor of a bill for value; he is the person ultimately liable and his payment discharges the bill altogether." The payment by the acceptor in such a case discharges the bill because he is the person appearing on the bill to be the party primarily liable, and his remedy is on the contract of the accommodated party to reimburse him. The payment by the accommodated party discharges the bill because he is in fact the party primarily liable. Mr. Ames says that "the accommodation acceptance or note is not extinguished at law by a re-transfer to the drawer or payee for whose accommodation the paper was given; but the re-transfer in such cases would operate in equity as a virtual extinguishment."[*]

Payment by one of several joint acceptors discharges the bill.—This is nowhere stated in terms in the act, but in "Harmer v. Steele,"[77] Wilde, C. J., said: "There is no doubt that, when a bill has been paid at maturity by a sole acceptor to a third person who is the holder, no action can afterwards be brought upon the acceptance; and it is equally certain that if one of several joint acceptors pays the bill at maturity to such third person being the holder, the contract of acceptance is performed and no action can be maintained upon it. It is true that, in the latter case, it may be that the acceptor who has paid the bill may have a right of action against the other joint acceptors for contribution if the state of accounts between them, or the terms on which they agreed with one another to become joint acceptors should afford ground for such an action, but that action would not be on the contract of acceptance on the bill, but on a different contract arising out of the state of accounts between the joint acceptors, or the terms on which they agreed together to accept."

The discharge referred to in last paragraph takes place even if the acceptor so paying accepted for accommoda-

[76] 3 Q. B., 459

[*] 2 *Ames*, cases on B. & N., 823.

[77] 4 Exch. 1.

tion of the others.—In "Harmer v. Steele,"[78] cited in the preceding note, a hypothetical case was put with reference to which Wilde, C. J., said: "Suppose there were three acceptors, one for the accommodation of the other two; he purchases the bill during its currency and retains it after it is due; may he not indorse it and give a right of action to his indorsee? We think the answer is that he cannot give such a right of action; that he may sue the other joint makers" (acceptors?) "for what may be due to him in respect of his having accepted for their accommodation and protected them from the payment of the bill, but that he cannot transfer this or any other right against the joint acceptors by indorsing the bill." A payment by such accommodation acceptor at maturity would, of course, have the same effect in extinguishing the bill as the prior purchase and retention of the bill in the supposititious case.

Re-issue of bill or negotiation by party paying it.—It will be observed that the drawer or indorser of a bill who pays it, even at maturity, does not thus extinguish the bill unless it was made for his accommodation. He is remitted to his former rights as regards the acceptor and all antecedent parties, and may, if he thinks fit, strike out his own and all subsequent indorsements and again negotiate the bill. But there is one case in which the bill cannot be re-issued. It is dealt with in the following note.

Drawer paying a bill payable to third party may not re-issue it.—It was early settled that where a bill was payable to the drawer's own order and was paid by him he could re-issue it. This was the case of "Callow v. Lawrence,"[79] in which a bill was drawn by one, Pywell, payable to his own order, indorsed by him to Taylor, by Taylor to Barnett, and by Barnett to his bankers. It was dishonored and returned to Barnett, in whose hands Pywell paid it. Lord Ellenborough said, as already quoted, that a bill of exchange was negotiable "ad infinitum" until paid by or discharged on behalf of

[78] 4 Exch. 1.
[79] 3 M. & S., 95.

the acceptor, adding, "if the drawer has paid the bill it seems that he may sue the acceptor upon the bill, and if instead of suing the acceptor he put it in circulation upon his own indorsement only it does not prejudice any of the other parties who have indorsed the bill that the holder should be at liberty to sue the acceptor. The case would be different if the circulation of the bill would have the effect of prejudicing any of the indorsers. In 'Beck v. Robley,' if the bill had been negotiable it would have had the effect of rendering Hodgson liable upon his indorsement which, in point of law, was discharged by Brown's taking up of the bill." The case mentioned of "Beck v. Robley" is the origin of the clause *a* of section 140. It has given rise to much unintelligent comment on the part of a very learned judge, but the principle on which it was decided is very easily understood. It appeared that Brown drew a bill upon Robley, payable to Hodgson, or order, which was accepted by Robley and indorsed by Hodgson. It was not paid when due and was taken up by Brown, Hodgson's indorsement still remaining. Brown afterwards gave it to Beck as security for money. Now, the payment by Brown, the drawer, had the effect of striking out Hodgson's indorsement. It discharged Hodgson. Payment by any of the parties on a bill has the effect of discharging all the parties who, if they had been called upon to pay, would have had recourse to the party so paying. Brown could not therefore re-issue the bill. It could not be re-issued, without Hodgson's indorsement, but that had to be considered as struck out. As Lord Mansfield said: "If the bill were negotiable Hodgson would be liable, for which there is no color." He was mistaken in saying that upon payment by Brown it ceased to be a bill. It was a bill and Brown could sue the acceptor on it as a bill, but he could not re-issue it because it could not be re-issued without Hodgson's indorsement, which should have been struck out when the bill was paid by Brown. If the bill had been drawn to Brown's order as in the case of of "Callow v. Lawrence," he could have re-issued the bill because the rights of no indorser would have been prejudiced.

[a] See per Cresswell, J., in *Jones v. Broadhurst*, 9 C. B., 173.

Discharge by acceptor becoming holder.—The principle embodied in section 141 is not peculiar to the law of bills and notes. It is the general principle that when the liability to pay and the right to receive concur in the same person and in the same right the obligation is extinguished. This was the case of "Harmer v. Steele,"[81] already referred to, which arose on a demurrer. The pleadings disclosed that the bill had been indorsed and delivered by the payee and holder to one of the acceptors before it was due, for valuable consideration, and that he had held it until it was due, after which it had been delivered to the plaintiff. The court said: "The substantial answer which it was contended the plea gives to the declaration is that the bill at the time it became due was in the hands and the property of one of the three acceptors who were liable to pay, and that the present liability to pay and the present right to receive the amount of the bill concurring in the same person operated as a payment and a performance of the contract of acceptance on which consequently no action could be afterwards maintained. And we are of opinion that this is a good ground of defence in substance." The case is one where the contract has been discharged by performance and the bill is therefore extinguished.

Unconditional renunciation of rights by holder at or after maturity discharges bill.

142. When the holder of a bill, at or after its maturity, absolutely and unconditionally renounces his rights against the acceptor, the bill is discharged.

In like manner liability of any party may be discharged before, at or after maturity.

(2) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity.

Renunciation must be in writing unless bill delivered up.

(3) A renunciation must be in writing, unless the bill is delivered up to the acceptor.

Nothing herein affects holder in due course without notice of renunciation.

(4) Nothing in this section shall affect the rights of a holder in due course without notice of renunciation. 53 V., c. 33, s. 61. **[E. s. 62.]**

[81] 4 Exch. 1.

Renunciation discharges the bill.—This section embodies the law as laid down in the case of "Foster v. Dawber."[82] It is a singular departure from the doctrine of the common law that an obligation once validly entered into cannot be discharged without consideration or a document under seal. Parke, B., explains it as having come into English law as part of the law merchant. "No person is liable on a bill of exchange except through the law merchant; and probably the law merchant being introduced into this country and differing very much from the simplicity of the common law,"—(it differs in this case by being more simple),—"at the same time was introduced that rule quoted from Paillet as prevailing in foreign countries, viz.: that there may be a release and discharge from a debt by express words, although unaccompanied by satisfaction or by any solemn instrument. Such appears to be the law of France, and probably it was for the reason above stated that it has been adopted here with respect to a bill of exchange." The learned baron proceeds to deal with the contention that the doctrine could not apply to a promissory note, which had its origin not in the law merchant but in the statute of 3 and 4 Anne, holding that promissory notes must be governed by the same principle. It will be observed that in dealing with the discharge of the bill by renunciation of the holder's rights against the acceptor the statute is confined to the case of a renunciation at or after maturity. The acceptor may be discharged from his liability on the bill by a renunciation either before, at, or after maturity and so may the liability of any of the other parties to the bill. Before the passing of the act this renunciation was complete and effective without any writing and without the surrender of the instrument, but it was thought well to require some formality. It still remains law that no consideration is necessary for such a discharge, but in order to be effective a renunciation must be in writing unless the bill is delivered up to the acceptor. And nothing in the section contained affects the rights of a holder in due course without notice of the renunciation.

[82] 6 Ex., 839.

Renunciation distinguished from unexecuted intention to cancel.—In re George,[53] the holder of a note payable on demand, when "in articulo mortis" gave a written direction that it should be destroyed as soon as found. That is the writing was made by the nurse at the instance of the dying man, all except the last sentence, and was as follows: "30 August. It is by Mr. George's dying wish that the cheque (sic) for £2,000, money lent to Mr. Francis, be destroyed as soon as found. Mr. George is fully conscious and in his sound mind. (Signed.) Nurse T." It was held by Chitty, J., that the memorandum did not satisfy the statute. "It is plain that what must be in writing is an absolute and unconditional renunciation of rights. It is not necessary to put those words in; but that must be the effect of the document. Then the document is not to be a note or memorandum of the renunciation or of an intention to do it, but it must be itself the record of the renunciation." The question is discussed but not anwered, whether the writing must be signed and the conclusion reached that, although the decedent intended the note to be cancelled, what had been done was not an absolute and unconditional renunciation in writing such as the statute required.

Intentional cancellation appearing on bill discharges it.

143. Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged.

So as to intentional cancellation of signature of any party by holder.

(2) In like manner, any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent.

Indorser who would have had recourse to such party discharged.

(3) In such case, any endorser who would have had a right of recourse against the party whose signature is cancelled is also discharged. 53 V., c. 33, s. 2. [E. s. 63.]

[53] 44 Ch D., 627.

Unintentional or mistaken cancellation no discharge, but burden of proof on party alleging it was unintentional or mistaken.

144. **A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative: Provided that where a bill or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority.** 53 V., c. 33, s. 62. [E. s. 63.]

Cancellation, even when intentional, may not be equivalent to payment.—This distinction, with its consequences, was pointed out by Lindley, J., in "Yglesias v. River Plate Bank,"[84] in which bills were drawn by the plaintiff and held by the defendants and by arrangement between the holders and Santayana, the acceptor, the bills were intentionally cancelled and given up to the acceptor. The plaintiff was not a party to this arrangement and he contended that, although the bills had not in fact been paid, yet as they had been cancelled they must be treated as having been paid and he was demanding back from the defendants £2,500 that he had given as collateral security for their payment. It was held that the cancellation discharged the plaintiff and the acceptor from all liability on the bills themselves, and also deprived the plaintiff of all remedy on the bills against Santayana as acceptor. But their cancellation was not, under the circumstances of the case, equivalent to payment in full. It is not necessary to set out the circumstances. The point is merely that the cancellation, while it discharges the bill as a bill, is not necessarily equivalent to, nor has it necessarily the same effect as a payment of the bill.

Cancellation by tearing.—In "Ingham v. Primrose,"[85] the intention was to cancel the bill, which had been accepted by the defendant and given to one, Murgatroyd, for the purpose of procuring it to be discounted. The effort was in vain and defendant "tore the paper in half and threw it away in the street." Murgatroyd picked up the pieces and afterwards pasted them together and

[84] 3 C. P. D., 60, 330.
[85] 7 C. B., N. S., 82 (1859).

passed the bill to another, who indorsed it to the plaintiff. The court understood the fact to be that the tearing had been done in such a way that the appearance of the bill when it reached the plaintiff's hands was at least as consistent with its having been divided into two parts for the purpose of transmission by post as with its having been torn for the purpose of annulling it and gave judgment for the plaintiff. But, although the case is sometimes cited without criticism, Brett, L. J., in "Baxendale v. Bennett,"[86] said, "it seems difficult to support that case and the correct mode of dealing with it is to say we do not agree with it." Mr. Ames, therefore, treats the case of "Ingham v. Primrose"[87] as overruled. He says at another page:[88] "A cancellation by the holder 'amino cancellandi,' is equivalent to a destruction of the instrument. It is difficult to state with accuracy what will be a sufficient cancellation to effect a purchaser with notice, but it seems clear that there was an adequate cancellation in "Ingham v. Primrose," and it is therefore not surprising to find that the opinion of the court in that case to the contrary has been overruled."

Unintentional cancellation.—This is declared by the statute to be inoperative, and the special verdict in "Warwick v. Rogers,"[89] found that "where a bill was cancelled through error or mistake the same has been indicated in writing on the bill, note or cheque returned." The statute says that where a bill or any signature thereon appears to have been cancelled, the burden of proof lies upon the party who alleges that it was made unintentionally or under a mistake, or without authority. It follows from this, as Mr. Justice Maclaren says, that when a bill produced at the trial has the defendant's signature erased, the plaintiff cannot recover without evidence that it was done by mistake;[90] for which he cites a number of cases, English and Canadian.

[86] 3 Q. B. D., 525.
[87] 2 *Ames cases on B & N.*, 812.
[88] 2 *Ames cases on B & N.*, 822.
[89] 5 M. & G., 184.
[90] *Maclaren on Bills*, 3rd Ed., 346.

Material alteration without assent of all parties liable on the bill avoids it, except as against party making or assenting to alteration and subsequent endorsers. Provided, if alteration not apparent, holder in due course may avail himself of bill as if unaltered.

145. Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is voided, except as against a party who has himself made, authorized, or assented to the alteration and subsequent endorsers; Provided, that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor. 53 V., c. 33, s. 63. [E. s. 64.]

Material alterations are

146. In particular any alteration.—

Date.

(a) of the date;

Sum payable.

(b) of the sum payable;

Time of payment.

(c) of the time of payment;

Place of payment.

(d) of the place of payment;

Addition of place of payment without acceptor's assent where bill accepted generally.

(e) by the addition of a place of payment without the acceptor's assent where a bill has been accepted generally, is a material alteration. 53 V., c. 33, s. 63. [E. s. 64.]

Common Law Rule modified.—The rule of the common law as established in Pigot's case[91] was that the holder of a document must preserve its integrity at his peril, and any material alterations made even without his knowledge and without negligence on his part rendered the instrument void. The proviso materially modifies this rule.

Raised cheques.—In "Imperial Bank of Canada v. Bank of Hamilton,"[92] a cheque for five dollars was taken by the drawer to his bankers and certified by them, after which it was fraudulently altered by the drawer to a cheque for five hundred dollars and negotiated to a holder in due course. It was then presented and paid. Next day the fraud was discovered and the bank gave no-

[91] 11 Rep., 47.
[92] 93 A. C., 49.

tice to the holder. Under the proviso the cheque was good in the hands of the bona fide holder for five dollars, but the bank that paid $500 on the cheque could recover back the balance.

Alteration by chemicals.—A striking case of alteration is given in Ames' collection of cases on bills and notes,* in which a note was made for $500 and indorsed by the defendant. The holder, by the use of chemicals, rendered the words and figures "five hundred" and "$500" invisible and wrote over them "two thousand" and "$2,000." The fraud was afterwards discovered and the original words and figures were restored by applying to the paper a solution of nutgalls. The argument was ingenious, that the contract entered into by the defendant had been brought out visibly, unaltered either by addition to or subtraction from its terms and agreements. "It was for a time veiled by a fraud by which the maker succeeded in obtaining more than its face value; but, that veil removed, the indorser, an original promisor, and the plaintiff, the original holder for value, meet each other on the original contract unchanged." But the court said: "The defendant never made" (indorsed) "the note for $2,000 which was the only one that the plaintiff accepted." In other words, the defendant did not indorse a note for $2,000 and the plaintiff did not discount a note for $500, so that the plaintiff could not recover either amount. The proviso in section 145 would seem to meet such a case as this and enable the holder to avail himself of the bill as if it had not been altered.

Acceptance and Payment for Honour.

Where bill protested for non-acceptance or for better security and is not overdue, any one not a party already liable on bill may accept for honour of any party liable, or of person for whose account bill is drawn.

147. Where a bill of exchange has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill supra protest, for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn. 53 V., c. 33, **s. 64. (E. s. 65).**

* *Citizen's Nat. Bank v. Richmond,* 1 Ames Cases, 607; 121 Mass., 110.

Bill may be accepted for honour for part.

148. A bill may be accepted for honour for part only of the sum for which it is drawn. 53 V., c. 33, s. 64.

Cross reference.—See sec. 118 (p. 344) as to note of protest being sufficient without the actual extension of the protest.

Who may accept for honor.—The statute says, any person not already liable on the bill, and Chalmers says the act appears to enable the drawee as well as a stranger to the bill to accept for honour.[93] Mr. Daniel, on this point says:* "A stranger may undoubtedly accept for honour, and by the word 'stranger' in this connection is meant any third person not a party to the bill. It seems that acceptance for honour may also be made by the drawee, who, if he does not choose to accept the bill drawn generally on account of the person in whose favor, or on whose account he is advised it is drawn may accept it for the honour of the drawer, or of the indorsers, or of all or any of them. But if the drawee were bound in good faith to accept the bill he cannot change his relations to the parties, and accept it supra protest for the honour of an indorser; he must either accept or refuse." For the first part of this statement the authority given is Story on Bills, section 259. For the latter statement, "Shimmelpennich v. Bayer," 1 Peters 264, and Chitty on Bills" (*345) 386, are cited.

Holder may refuse acceptance for honor.—In the United States, as in England, Chalmers says, the holder may refuse to allow acceptance for honor. He may wish to exercise his immediate right of recourse which arises on non-acceptance.

Protest for better security.—This occurs where the original acceptor suspends payment; see sec. 116. Lord Loughborough in "ex parte Wackerbach,[94] said he had talked with one or two persons in trade upon this, who told him that the persons accepting for honor had a right

[93] *Chalmers on Bills*, 6th Ed., 229.
* 1 *Daniel on Neg. Inst.*, 5th Ed., p 520 & 524.
[94] 5 *Vesey, Jr*, 574.

to come upon the acceptor. He had put the case of an acceptor having no effects, but the answer was that they accepted for the honor of the drawer, but they accepted an accepted bill and he allowed recourse to the acceptor after resort was first had to the drawer. The editor's note to this case in the English Reports, vol. 31, p. 747, is that the case seems overruled by Lord Erskine, "ex parte Lambert," 13 Vesey 179, holding that a person taking up a bill for the honor of the drawer has no right against the acceptor without effects. But the note to "ex parte Lambert," in turn states that it is held to be overruled by "in re Overend, ex parte Swan," L. R., 6 Eq. 355-361. See comment under section 155.

Acceptance for honour presumed to be for honour of drawer if it does not state for whom.

149. Where an acceptance for honour does not expressly state for whose honour it is made, it is deemed to an acceptance for the honour of the drawer. 53 V., c. 33, s. 64. (E. s. 65).

Usual practice.—It is usual for the acceptor for honor to state for whose honor he accepts.

Maturity of bill payable after sight calculated from date of protesting.

150. Where a bill payable after sight is accepted for honour, its maturity is calculated from the date of protesting for non-acceptance, and not from the date of the acceptance for honour. 53 V., c. 33, s. 64. [E. s. 65.]

Former rule as to maturity.—Chalmers says this section brings the law into accordance with mercantile understanding and gets rid of an inconvenient ruling to the effect that maturity was to be calculated from the date of acceptance for honour.[95]

Acceptance for honour.

151. An acceptance for honour supra protest, in order to be valid must,—

Must be written on bill and indicate that it is for honour.

(a) be written on the bill, and indicate that it is an acceptance for honour; and

Must be signed by acceptor for honour.

(b) be signed by the acceptor for honour. 53 V., c. 33, s. 64. [E. s. 65.]

[95] *Chalmers on Bills*, 6th Ed., p. 230.

Requisites of valid acceptance for honour.—It is sufficient to write "accepted, S. P." on the bill and sign it, but as already stated it is usual to say for whose honour the bill is accepted. The practice is also to have the acceptance for honour attested by a notarial "act of honour recording the transaction," but Judge Chalmers suggests that this is perhaps no longer necessary, the clause requiring this having been struck out of the bill as presented to the Imperial House.*

Acceptor for honour engages to pay presentment if drawer does not, provided due presentment, protest and notice to him of these facts.

152. The acceptor for honour of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment and protested for non-payment, and that he receives notice of these facts.

He is liable to holder and all parties subsequent to him for whose honour he accepted.

(2) The acceptor for honour is liable to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted. 53 V., c. 33, s. 65. [E. s. 66.]

Cross reference.—See section 118 as to noting the protest being sufficient without extension.

Estoppel against acceptor for honor.—It seems, says Chalmers,† under this section, that the acceptor for honour is bound by the estoppels which bind an ordinary acceptor, and also by the estoppels which would bind the party for whose honour he accepted. He refers to the decision in "Phillips v. im Thurn."[95]

Where bill protested for non-payment, any person may pay supra protest for honour of any party liable, or for person on whose account drawn. Person whose payment will discharge most parties preferred.

153. Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

(2) Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill shall have the preference.

* *Chalmers on Bills*, 6th Ed., 230.
† *Chalmers on Bills*, 6th Ed., 232.
95 L. R., 1 C. P. at 471. 18 C. B. N. S., 694.

Holder refusing such payment loses recourse against any party who would have been discharged.

(3) Where the holder of a bill refuses to receive payment supra protest, he shall lose his right of recourse against any party who would have been discharged by such payment.

Payer for honour entitled to bill and protest.

(4) The payer for honour, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonour, is entitled to receive both the bill itself and the protest.

Holder not delivering liable to him in dam- [illegible]

(5) If the holder does not on demand in such case deliver up the bill and protest, he shall be liable to the payer for honour in damages. 53 V., c. 33, s. 67. [E. s. 68.]

Cross references.—That noting is sufficient without extension; see sec. 118. As to the person whose payment will discharge most parties to the bill, see sec. 155.

Payment to operate as for honour must [illegible] merely voluntary. Must be attested by notarial act.

154. Payment for honour supra protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour, which may be appended to the protest or form an extension of it.

Notarial act must be founded on declaration of payer or agent declaring for whose honour he pays.

(2) The notarial act of honour must be founded on a declaration made by the payer for honour, or his agent in that behalf, declaring his intention to pay the bill for honour, and for whose honour he pays. 53 V., c. 33, s. 67. [E. s. 68.]

Form of notarial act. See appendix.

All parties subsequent to one for whose honour bill is paid are discharged. Payer subrogated for and succeeds to rights and duties of holder.

155. Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are discharged, but the payer for honour is subrogated for, and succeeds to both the rights and duties of the holder as regards the party for whose honour he pays, and all parties liable to that party. 53 V., c. 33, s. 67. [E. s. 68.]

Payer for honour subrogated to holder, not to party for whose honour he pays.—In ex parte Lambert[97] the facts were that Adams & Co., at New York, drew on a London firm two bills which were dishonoured. Lambert & Co. being interested in the welfare of the American house, took up one of these bills before maturity and the other after, but not under protest. They took them up simply to save the drawers the discredit of having the bills returned to New York. The Lord Chancellor said that if Adams & Co. had been suing, the acceptors might have set up the defence of accommodation, though that would not have been an answer to an indorsee for value without notice. In this case, he said, the bill had been taken up by the plaintiff for the honour of the drawer and the plaintiff had a clear right as against the drawer. So he had a right to stand in the place of the drawer, but he could not make a title stronger than that of the drawer and oust the assignees of the bankrupts of the defence they would have had against the drawer. The fallacy of this reasoning was in the assumption that the bankrupts were being deprived of any advantage by the transfer to the plaintiffs. The holders of the bills, if they had not been taken over by the plaintiff, would have been able to claim against the bankrupts and prove on their estate. Accommodation as has been seen (ante p. 217) is not an equity attaching to the bill and the transferee by a transfer even of an overdue bill can claim against the accommodation acceptor. The person who takes a bill, takes it with the title of the person from whom he gets it, even if he takes it overdue and not with the title of the person for the sake of whose credit he takes it. This is the precise point of the decision in "re Overend,"[98] which very properly overruled "ex parte Lambert." In the "Overend" case, Malins, V. C., said: "I desire to be understood as resting my decision on two distinct points: First, that an indorsee or transferee for value of a bill of exchange after dishonor, has a right to recover against the acceptor, whether the bill was given for value or not, unless there be an equity attached to the bill itself amounting to a discharge of it. I have already stated that a right of set-off is not an equity

[97] 13 *Vesey*, 179.
[98] L. R., 6 Eq., 358.

which attaches to the bill itself. * * * Secondly, that the person who takes up a bill supra protest for the honor of a particular party to the bill succeeds to the title of the person from whom, not for whom, he receives it and has all the title of such person to sue upon it, except that he discharges all the parties to the bill subsequent to the one for whose honor he takes it up and that he cannot himself indorse it over."

Lost Instruments.

Loser of bill may apply for another giving indemnity if required in case bill is found.

156. Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever, in case the bill alleged to have been lost shall be found again.

Drawer refusing on request may be compelled.

(2) If the drawer, on request as aforesaid, refuses to give such duplicate bill, he may be compelled to do so. 53 V., c. 33, s. 68. (E. s. 69.)

Court may order that loss be not set up provided indemnity given.

157. In any action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity is given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question. 53 V., c. 33, s. 69. (E. s. 70).

Short history of the section.—Apart from statute no action could be brought at law upon a lost bill if negotiable, although in "Pierson v. Hutchinson,"[99] Lord Ellenborough said that if the bill were proved to be destroyed he should feel no difficulty in receiving evidence of its contents and directing the jury to find for the plaintiff. But since he could neither produce the bill nor prove that it was destroyed he must resort to a court of equity for relief. The rule of law applied whether the loss was before or after maturity, and whether the bill was negotiable by delivery or indorsement, the reason

[99] 2 *Camp*, 211.

being, not merely that the plaintiff was in danger of having the bill turn up in the hands of a bona fide holder for value, without notice, but that on payment he had a right to have the bill "as a voucher and discharge 'pro tanto' in his account with the drawer."[100] But in equity the holder might recover the amount of a lost or destroyed bill or note upon giving the acceptor or maker adequate indemnity against subsequent liability thereon. This procedure of the courts of equity has been made applicable by statute to the courts of common law. The obligation of the acceptor or maker of a lost bill or note to supply another upon loss of the first one, has its origin in a statute. Chalmers refers to it in his note under the section corresponding to section 156, citing 9 and 10 Will 3, c. 17, s. 3, which he says applied only to inland bills for £5 and upwards. He points out the inadequacy of the remedy afforded by the section in that it gives no power to obtain an indorsement or acceptance over again.[1]

Remedy for refusal to give a new bill.—Chalmers says that presumably if the drawer, on tender of indemnity, declined to give a new bill, an action would lie to compel him, and damages might be claimed in the alternative.[1]

Plaintiff should offer indemnity before suing on lost bill.—Where the loss of the bill was pleaded, and plaintiffs applied under the section of the Common Law Procedure act corresponding to section 157 to have the plea struck out on their giving an indemnity to the court, it was held that, as the plaintiffs had proceeded in the action without previously offering any indemnity, although the bill was lost they must pay the defendant's costs which had been incurred through their default. As Lord Tenterden pointed out in "Hansard v. Robinson,"[2] there is no complete equity to obtain relief unless nor until the plaintiff has tendered an indemnity to the party liable on the bill. Pursuing this analogy the plaintiff has not put himself in a position to sue on the bill at law

[100] 2 Per Lord Tenterden in *Hansard* v. *Robinson*, 7 B & C., 90.
[1] *Chalmers on Bills*, 6th Ed., 236.
[2] 7 B. & C., 90.

until the indemnity is offered and the defendant's plea of lost bill is a perfect defence to the case as it stands in the absence of such a tender.

Loss or destruction does not excuse notice of dishonour.—"Does it make any difference in this case that the bills were destroyed before they became due? I think not; for they might still have been paid with or without indemnity, and the defendant not hearing that they were dishonoured might have been prevented from pressing his remedy against the acceptors."[2]

Loss of half note.—It has been held that the owner of a bank note which has been cut in halves for safety in transmission may maintain an action at law against the bank upon production of one of the halves and proof of loss of the other, "Redmayne v. Burton."[3] The reason for requiring an indemnity does not seem to exist in such a case. The remaining half would not entitle the holder to claim the position of a holder in due course, and the possession of the half would be a sufficient voucher for the acceptor.

Voluntary destruction of bill or note.—This has been held according to Mr. Ames, in a number of American cases which he cites, to preclude the holder from all right to recover on the instrument either at law or in equity.[4]

BILL IN A SET.

Where bill is drawn in a set, each part numbered, the whole constitutes one bill.

158. Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill.

Acceptance must be written on one part only; may be on any part.

(2) The acceptance may be written on any part, and it must be written on one part only. 53 V., c. 33, s. 70. (E. s. 71)

[2] *Thackray* v. *Blackett*, 3 Camp., 164.
[3] 2 L. T., Rep., 324.
[4] 2 *Ames Cases on B. & N.*, 65.

Holder endorsing parts to different persons liable on every such part. Subsequent endorser liable on the part endorsed.

159. Where the holder of a set endorses two or more parts to different persons, he is liable on every such part, and every endorser subsequent to him is liable on the part he has himself endorsed as if the said parts were separate bills.

Where parts negotiated to different persons in due course holder whose title first accrues deemed true owner; proviso as to person paying part first presented.

(2) Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is, as between such holders, deemed the true owner of the bill: Provided that nothing in this subsection shall affect the rights of a person who in due course accepts or pays the part first presented to him.

Drawee accepting more than one part liable on each part in the hands of holders in due course.

(3) If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill.

Acceptor liable on part bearing acceptance in hands of holder in due course if not delivered up.

(4) When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof.

Subject as aforesaid discharging one part discharges the whole.

(5) Subject to the provisions of this section, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged. 53 V., c. 33, s. 70. (E. s. 71.)

Right of true owner to get all the parts of the set.—The foregoing sections need little elucidation. Judge Chalmers has a number of comments drawn from a consideration of the French and German law relating to the subject.[4] The only important comment is the reference to dicta to the effect that the true owner of the bill is entitled to get the remaining parts of the set from one who in good faith has given value for them. Judge Chalmers says that these dicta are inconsistent with the rights given by sub-section 2.

[4] *Chalmers on Bills*, 6th Ed., p. 238.

Conflict of Laws.

As Mr. Dicey says,[5] any conflict of laws with regard to bills of exchange is now determined by the Bills of Exchange Act. "The act, however, is not exhaustive, and the sections relating to the conflict of laws do not settle all the questions of private international law in regard to a bill which might be raised in an English court." So far as the act does not extend there is no attempt made here to state the principles that govern. Those subjects have been so thoroughly treated by Westlake and Dicey that any comments here presented would be a mere reproduction of their work. Mr. Dicey's discussion of the subject of bills and notes will be found at pages 599 to 617, and Westlake's, at pages 265 to 273.

Validity of bill in form determined by law of place of issue; validity as regards supervening contracts, acceptance, etc., by law of place of contract.

160. Where a bill drawn in one country is negotiated, accepted or payable in another, the validity of the bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or endorsement, or acceptance supra protest, is determined by the law of the place where the contract was made: Provided that,—

Bill issued out of Canada not invalid by reason only that it is not stamped according to law of place of issue.

(a) where a bill is issued out of Canada, it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue;

Where such bill conforms as regards form to law of Canada it may, for enforcing payment, be treated as valid between persons in Canada.

(b) where a bill, issued out of Canada, conforms, as regards requisites in form, to the law of Canada, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold or become parties to it in Canda.. 53 V., c. 33, s. 71. [E. s. 72.]

Place of issue, and place where the contract is made.—The place of issue of a note or bill is not the place

[5] *Dicey on Conflict of Laws*, 601.

where the signature is affixed, but where the bill is delivered. The issue of the bill is defined in section 2 *i* as the first delivery of a bill complete in form to a person who takes as a holder. The contract of endorsement imports both signature and delivery, and the place of delivery is therefore the place where that contract is completely made. Acceptance, according to Mr. Ames, is complete without delivery, but we have seen that this is not English law.[a]

Bill issued out of Canada.—The want of a stamp required to make the bill valid in the place of issue does not render it invalid according to Canadian law as enacted by this section, and this without regard to the distinction otherwise important between a law making the instrument void for want of a stamp and one merely rendering it inadmissible as evidence. According to the general principle of private international law, if the non-compliance with the stamp law of the place where the bill was issued made the instrument void, it seems that it would be regarded as void everywhere else. The statute is not in accord with this rule. It provides by sub-section *a* that a bill drawn in one country and which is negotiated accepted, or payable in another, is not invalid by reason only that it is not stamped in accordance with the law of the place of issue. Of course it goes without saying that it may be invalid for other reasons.

The fact that we have no stamp law in Canada obviates the necessity of answering the more difficult question whether such a bill would be admissible in evidence if the stamp act of Canada were not complied with. That would, of course, depend on the terms of the act, and is settled for English courts by the provisions of the English Stamp Act.

Illustrations.—Judge Chalmers gives a number of illustrations of the working of these sections.[b] By German law, for example, a bill need not express the value received. By French law it must. A bill drawn in Germany which does not express the value, is nevertheless

[a] Ante, p. 139.
[b] *Chalmers on Bills*, 6th Ed., 242

valid although payable in Paris where the value must be expressed to make the bill valid. This is according to the general rule of private international law. By the law of Illinois a verbal acceptance is valid. A bill drawn in London on a town in Illinois and accepted there is validly accepted without writing, although the writing is required to make an acceptance valid by English law A bill is drawn in Paris without expressing that value value has been received. It is invalid there, but if it is indorsed in England the indorser could be sued there under this law, though the drawer could not be. This is by the express provision of the latter part of the section.

Subject to provisions of Act, interpretation of drawing, endorsement, etc., determined by law of place where contract made Proviso, that endorsement of inland bill abroad is interpreted as regards payer by Canadian law.

161. Subject to the provisions of this Act, the interpretation of the drawing, endorsement, acceptance or acceptance supra protest of a bill, drawn in one country and negotiated, accepted or payable in another, is determined by the law of the place where such contract is made: Provided that where an inland bill is endorsed in a foreign country, the endorsement shall, as regards the payer, be interpreted according to the law of Canada. 53 V., c. 33, s. 71. [E. s. 72.]

Does "Interpretation" include the legal obligations resulting from the contract?—Judge Chalmers answers this question in the affirmative, saying that the term "interpretation" in this sub-section, it is submitted, clearly includes the obligation of the parties as deduced from such interpretation.[7]

Are the obligations on a foreign bill determined by the lex loci contractus.—The statute seems to say so in the terms of the above section. But Mr. Dicey says[8] "the passing of the Bills of Exchange Act gives, it is submitted, no reason for altering the opinion published some years ago by the present writer that the rules determining the rights and liabilities of the different parties to a bill are, as regards the conflict of laws, with

[7] *Chalmers on Bills*, 6th Ed., 244. See also *Alcock* v. *Smith*, (1892), 1 Ch. at p. 256.
[8] *Dicey on Confl. Laws*, 601.

rare exceptions, the applications of two principles; first, that the formal validity of a contract is determined by the law of the country where the contract is made, and secondly, that the interpretation of a contract and the rights and obligations arising under it are determined in accordance with the law to which the parties may be presumed to have intended to submit themselves, i. e., the proper law of the contract. What is the proper law of the contract he explains elsewhere in the form of a series of sub-rules; the sub-rule number 3 being that in the absence of countervailing considerations two presumptions have effect: first, that "prima facie" the proper law of contract is presumed to be the law of the country where the contract is made;[9] secondly, that when the contract is made in one country and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take place (the lex loci solutionis.")[10]

This principle seems at first sight to be at variance with the rule stated in the text of the statute, but Judge Chalmers puts the case of a bill of exchange accepted in France, payable in England.[1] The statute says that the obligations of the acceptor are determined by the law of France. But what is the French law as to a bill payable in England. Probably the " lex loci solutionis," that is the law of England in the case put. In this way the terms of the statute can be reconciled with the principle stated by Mr. Dicey. But is this what the statute means to say? It may be held to mean this when Mr. Dicey's explanation of the matter at page 607 is taken into account. But, in the absence of that explanation, one would say that in interpreting this section an English or a Canadian court, looking at an acceptance made in France would ask the question, what is the French law as to the obligations of an acceptor, and not what law, other than French law, will a French court apply to an acceptance of a bill made payable elsewhere than in France. In asking the latter question you are not applying French law to the interpretation of a contract made

[9] There is a qualification to this statement which is not here given. See *Dicey on Conf. Laws*, p. 569.

[10] *Dicey on Conf. Laws*, p 570.

in France, as the statute bids you to do, but applying a principle of private international law to the contract because a French court would do so in the case of a contract to be performed elsewhere, in other words, because a French court would apply a different principle from that stated in terms in this act.

Duties of holder respecting presentment, necessity and efficiency of protest, or notice of dishonour determined by law of place where act done or bill dishonoured.

162. The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, are determined by the law of the place where the act is done or the bill is dishonoured. 53 V., c. 33, s. 71. [E. s. 72 (3).]

Notice of dishonour sufficient if according to law of the place where given.—This was deccided in "Hirschfeld v. Smith,"[11] where a bill was drawn in England directed to a drawee in France, by whom it was accepted. Upon its dishonour in France it was held that a notice of dishonour given to the defendant according to the formalities and within the time prescribed by French law was a good notice. The defendant was in England and the bill had been indorsed to him in England, and by him in England to the plaintiff. But it had been decided in "Rothschild v. Currie,"[12] that in a case held to be similar the question was to be determined according to the law of France, and here the sufficiency of notice of dishonour must therefore be determined by French law. Erle, C. J., added that if the contract of an indorser in England of a bill accepted payable in France were held to be a contract governed by the law of England, the notice in this case was sufficient. In "Horne v. Rouquette,"[13] the bill was drawn in England payable in Spain and was endorsed in England by the defendant to the plaintiff, who endorsed it to Monforte under circumstances which Brett, L. J., held to make it an endorsement by plaintiff to Monforte in Spain. It was again endorsed in Spain to another party. On its dishonour by non-acceptance a delay of

[11] L. R., 1 C. P., 340.
[12] 1 Q. B., 43.
[13] 3 Q. B. D., 514.

twelve days occurred before Monforte wrote to inform the plaintiff of the dishonour. The plaintiff immediately gave notice of the dishonour to the defendant. No notice of dishonour by non-acceptance was required by the law of Spain, and hence the plaintiff was held entitled to recover the amount of the bill.

Proof of the foreign law in such cases.—" In our courts foreign law is a matter of fact to be decided on the evidence of advocates practicing in the courts of the country whose law is to be ascertained; but if the witnesses in their evidence refer to any passage in the code of their country as containing the law applicable to the case, the court is at liberty to look at those passages and consider what is their proper meaning."[14] The further consideration of the topic is matter proper for a work on evidence and a full discussion will be found in Wigmore on Evidence, Volume I, section 564.

Presumption in the absence of evidence as to foreign law.—Mr. Justice Maclaren cites an Ontario and a New Brunswick case[15] for the principle that in the absence of proof of the foreign law applicable to the case it will be presumed that the law is the same as that of this country. The New Brunswick case is of no authority on the point.[16] It contains only remarks made by the judges in the course of the argument and the tendency of these is in the opposite direction. The question was as to presentment in Boston, and Carter, C. J., in answer to the contention that no presentment was proved, said: " We do not know that by the law of Massachusetts presentment is necessary." The case was decided on the ground of waiver and it was not necessary to rule as to the necessity for presentment, or the proof of the foreign law. The Ontario case is not reported, except as a note in the Digest,[17] in which it is said that " where a bill is made payable at a particular place in a foreign country and there is no evidence of presentment there, nor of the law of that country on the subject, the necessity for presentment must be determined by our law."

[14] *Concha* v. *Murrietta*, 40 C. D., 543.
[15] *Maclaren on Bills*, 3rd. Ed., p. 376.
[16] *Allen* v. *McNaughton*, 4 Allen N. B., 234.
[17] *Buffalo Bank* v. *Truscott*, 1 Ont. Dig., 1902, p. col., 702.

The subject is discussed by Mr. Daniel,[18] who states the rule as Mr. Justice Maclaren does, that in the absence of proof of the foreign law it will be presumed to be the same as that of the forum, "or what is the same in effect, when the laws of the foreign country are not put in proof as facts, the court will apply to the transaction in suit the laws of the forum." Mr. Daniel, however, states an exception to this rule to the effect that where countries have once belonged to the same government, the courts, after the separation, will adopt a presumption suitable to the case, and most frequently presume the continuance of pre-existing laws. He also says that "where the question is one relating to the law merchant which is of general application, as for instance, the number of days of grace, it would be presumed that they were fixed by the law merchant, that is that three days of grace were allowed—the law merchant being regarded as part of the common law."[19] If the days of grace were abolished by statute here, and the question arose in our courts as to the due date of a bill, it is by no means clear that in the absence of proof as to the foreign law, our courts would presume that there were no days of grace on the foreign bill or that they would determine the due date by our law where the bill was payable abroad. See, in this connection, section 164.

Where bill is drawn out of but payable in Canada not expressed in Canada currency, amount is payable according to rate of exchange of sight drafts at due date at place of payment.

163. Where a bill is drawn out of but payable in Canada, and the sum payable is not expressed in the currency of Canada, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable. 53 V., c. 33, s. 71. [E. s. 72 (4).]

Illustration.—Chalmers illustrates the principle of this section as follows: "Bill for 1,000 francs, payable three months after date, is drawn in France on London. The amount in English money the holder is entitled to receive is determined by the rate of exchange on the day the bill is payable."*

[18] 1 *Daniel on Neg. Inst.*, 5th Ed., p. 902.
[19] 1 *Daniel on Neg. Inst.*, 5th Ed., p. 904.
* *Chalmers on Bills*, 6th Ed., 247.

Due date determined by law of place where payable.

164. Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable. 53 V., c. 33, s. 71. [E. s. 72 (5).]

Cross reference.—See notes under section 162, ante p. 162 as to the mode of proving foreign law and the presumption in the absence of proof.

PART III.

CHEQUES ON A BANK.

Cheque defined.

165. A cheque is a bill of exchange drawn on a bank, payable on demand.

Provisions as to Bills apply generally to cheques.

(2) Except as otherwise provided in this part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque. 53 V., c. 33, s. 72. [E. s. 73.]

Cross references.—For definition of bill of exchange see section 17 (ante p. 25). Bank is defined in section 2 (c), and it has already been stated (ante p. 7) that the corresponding term in the English act is "banker." The explanation of or rather the reason for this difference between the English and the Canadian statute will be found at page 8 (ante). Mr. Justice Maclaren has a valuable note on the difference between English and Canadian practice in respect to cheques.[20]

Order by one branch on another is not a cheque.—That is it cannot be treated by the bank as a cheque. In "Capital Counties Bank v. Gordon,"[21] Lord Lindley, speaking of such documents, said: "I agree with the court of appeal in thinking that the bank, which is both drawer and drawee of these instruments is not entitled to treat them as bills of exchange as defined in section 3 of the Bills of Exchange Act, although a holder may sue the bank upon them and treat them either as bills of exchange or as promissory notes; sec. 5, sub-sec. 2. An instrument on which no action can be brought by the drawer can hardly be a bill of exchange within sec. 3 of the act, whatever it may be called in ordinary talk."

[20] *Maclaren on Bills*, 3rd Ed., p. 380.
[21] 1903, A. C. at p. 250.

166. Subject to the provisions of this Act,—

Where cheque not presented in reasonable time drawer is discharged to the extent of actual damage.

(a) where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment, as between him and the bank, to have the cheque paid, and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such bank to a larger amount than he would have been had such cheque been paid.

Holder is creditor of bank to the extent of such discharge.

(b) the holder of such cheque, as to which such drawer or person is discharged, shall be a creditor, in lieu of such drawer or person, of such bank to the extent of such discharge, and entitled to recover the amount from it.

Reasonable time interpreted with regard to nature of instrument, usage of banks, &c.

2. In determining what is a reasonable time, within this section, regard shall be had to the nature of the instrument, the usage of trade and of banks, and the facts of the particular case. 53 V., c. 33, s. 73. [E. s. 74.]

Delay in presenting cheque discharges drawer only to extent of actual damage.—Mr. Justice Maclaren explains that the provisions to which this section is subject are those relating to excuses for non-presentment and delay in presentment. (See sections 89-92 and 93.)[1] He explains further that as regards the drawer the effect of not presenting a cheque for payment within a reasonable time differs from that relating to other bills payable on demand. In regard to the latter, the drawer as well as the indorsers are wholly discharged by the failure to present them for payment within a reasonable time. See section 85 ante p. 276. "This part of the act relating to cheques does not modify the rule as regards the indorsers; but the present section lays down a different rule as regards the drawer, who is only discharged to the extent to which he actually suffers damage by the delay."

[1] *Maclaren on Bills*, 3rd Ed., p. 392.

Chalmers says[2] that the section is new law and was introduced in the House of Lords by Lord Bramwell to mitigate the rigour of the common law rule. "At common law the mere omission to present a cheque did not discharge the drawer, until at any rate six years had elapsed, and in this respect the common law appears to be unaltered. But if a cheque was presented within a reasonable time, as defined by the cases, and the drawer suffered by the delay, e. g., by the failure of the bank, the drawer was absolutely discharged, even though ultimately the bank might pay (say) fifteen shillings in the pound."[3]

Position of holder of cheque on which drawer has been discharged.—Chalmers commenting on sub-section *b* says that the effect of the sub-section read with sub-section *a* seems to be this: "A person draws a cheque for £100 on his banker, which is not presented for payment within a reasonable time of its issue as defined by the act. The banker fails, the drawer having at the time of the failure sufficient money to his credit to meet the cheque. The drawer is discharged, but the holder can prove for £100 against the banker's estate. If, however, the drawer had no funds to his credit, but was authorized to overdraw, the drawer would still be discharged; but the holder could not prove against the banker's estate."[4] It is not explained why the drawer would be discharged in the case last supposed. At common law, as Chalmers had already explained, the drawer would not be discharged at all by mere omission to present the cheque. By the statute it is provided that if he had the right as between himself and the banker to have the cheque paid and suffers actual damage through the delay he is discharged to the extent of the damage, that is to say, to the extent to which such drawer is a creditor of the banker to a larger amount than he would have been had such cheque been paid. In the case supposed, waiving the point that the drawer had no right as between himself and the banker to have the cheque paid having merely had authority to overdraw, which being without consideration, could have been immediately revoked, how

[3] *Chalmers on Bills*, 6th Ed., p. 250.
[4] *Chalmers on Bills*, 6th Ed., 252.

can it be said that he has suffered actual damage by the delay, especially when that damage is defined to be the extent to which he is a creditor of the bank to a larger amount than he otherwise would have been? He is not a creditor at all. If the banker had honoured his cheque he would have been a debtor. Where there has been no overdraft and the cheque has not been paid because of the banker's failure and the delay in presentation, the drawer is discharged to the extent to which he has suffered actual damage as defined by the act.

Reasonable time, is it a question of fact?—The reader will do well to refer to the note on page 77 where this topic is discussed with a reference to Thayer's Preliminary Treatise on Evidence. There is also a note on page 277, referring to an American case, in which it is said that the cases firmly establish the rule that where the material facts are admitted or not in dispute, the question as to what constitutes reasonable time for making demand is a question of law for the court. But the better American opinion seems otherwise.

Duty and authority of bank as to cheque determined by countermand or by notice of drawer's death.

167. The duty and authority of a bank to pay a cheque drawn on it by its customer, are determined by,—

(a) countermand of payment;

(b) notice of the customer's death. 53 V., c. 33, s. 74. [E. s. 75.]

Countermand of cheque by drawer.—Mr. Justice Maclaren says[3] that a customer may stop payment of a cheque before it is accepted, but not after, citing "Cohen v. Hale," 3 Q. B. D. 371, and "McLean v. Clydesdale Bank," 9 A. C. 95. He does not explain in what sense he uses the term "accepted." Probably he means marked or certified, as he uses these terms interchangeably at another page[4] where, however, he quotes Byles on Bills at page 33 to the effect that cheques are not accepted and that to issue them accepted would probably

[3] *Maclaren on Bills*, 3rd Ed., 396.
[4] p. 382.

be an infringement of the Bank Charter acts. The right of the drawer to countermand would seem from the case last cited to depend upon whether the cheque was held for value by the holder. If not, there is no reason why the drawer should not countermand his order. But even if the holder is a holder for value or an onerous holder, to use the expression employed in the case referred to, the bank is obliged to carry out the instructions of the drawer. The Lord President in that case said: " McLean came under an agreement with Cotton," (in whose favor the cheque was made) " that the cheque should be treated as cash, or in other words that the cheque should be cashed by Cotton's bankers, and having come under such an agreement, I do not think he was entitled to stop the cheque. No doubt he had the power to stop it, for the Bank of Scotland," (on which the cheque was drawn), " was bound to follow his instructions, but I think that in doing so he was doing a legal wrong and acting in violation of his agreement." This is in accordance with the terms of the statute, "the duty and authority of the bank to pay a cheque drawn on it by its customer are determined by countermand of payment," but the drawer may nevertheless have done a legal wrong to the holder in countermanding the payment.

Death of the drawer.—There does not seem to be any very good reason why the death of the drawer should revoke the authority of the bank to pay the customer's cheque. Daniel says:[5] " The death of the drawer of an ordinary bill of exchange does not revoke it and we can discern no principle of law which allows the death of the drawer to affect the rights of a cheque-holder who has given value for it. The idea that the death of the drawer of a cheque given to a payee for value operates a revocation is, as it seems to us, a total misconception of the law. For a cheque is a negotiable instrument, as often if not more frequently given for value than any other species of commercial paper. The drawer is deemed the principal debtor and it is anomalous to hold that his death in anywise lessens his obligations, or the right of the bank to pay it when given for value."

[5] *Daniel on Neg. Inst.*, 5th Ed., p. 642, Sec. 1618b.

The statute is not in line with this reasoning. It does not in terms make the death operate as a revocation but it makes the duty and authority of the bank to pay the cheque cease on notice of the customer's death, leaving the right of the holder against the decedent's estate to depend upon the circumstances under which he holds the cheque.

A cheque as donatio mortis causa.—In "McDonald v. McDonald,"[6] Graham, E. J., said: "The reason given in . . . English cases for cheques on a current account of the drawer, presented after his death, not constituting a valid 'donatio mortis causa,' is that the death of the drawer is a revocation of the banker's authority to pay.' It has been held accordingly that a cheque given as a "donatio mortis causa" must be presented or negotiated before notice of the death of the drawer in order to charge his estate. "When a man on his deathbed give to another an instrument such as a bond or a promissory note or an I. O. U., he gives a chose in action and the delivery of the instrument confers upon the donee all the rights to the chose in action arising out of the instrumen. That is the principle upon which 'Amis v. Witt,' 33 Beav. 619, was decided. . . . But a cheque is nothing more than an order to obtain a certain sum of money and it makes no difference whether the money is at a banker's or anywhere else. It is an order to deliver the money, and if the order is not acted upon in the lifetime of the person who gives it, it is worth nothing." Per Lord Romilly, M. R., in "Hewitt v. Kaye,"[7] In the later case of "Beak v. Beak,"[8] there was the added circumstance of the delivery of the pass-book, "the banker's acknowledgement of the debt," but this was held to make no difference. "The difference between a deposit note which was the document delivered over in the case of 'Amis v. Witt,' and a pass-book is enormous. A pass-book is not in any degree in the nature of a bond or an agreement," per Sir James Bacon, V. C. In the still later case of "Rolls v. Pearce,"[9] the cheque was to

[6] 35 N. S. R., 216 (1902).
[7] L. R., 6 Eq., 200 (1868).
[8] L. R., 13 Eq., 491.
[9] L. R., 5 Ch. D., 730.

the order of the testator's widow and was indorsed by her and paid into a foreign bank, and she drew against the amount of it. This was held to be a good "donatio mortis causa," although the cheque was not presented for payment at the bank on which it was drawn till after the d ath of the testator. A cheque payable to the donor's order stands upon a different footing from the donor's own cheque, and in "Clement v. Cheesman,"[10] it was held by Chitty, J., that a cheque payable to the donor, or order, and without having been indorsed by him, given by the donor during his last illness to his son, stood on the same footing as a promissory note or bill of exchange payable to the donor and would pass to the son by way of 'donatio mortis causa.' "The subject matter was not the testator's own cheque, but was his property, being the cheque of another man, which he had taken for value. In Byles on Bills[a] it is stated that a cheque drawn by the donor upon his own banker cannot be the subject of a 'donatio mortis causa,' because the death of the drawer is a revocation of the banker's authority to pay. But when the donor is dealing with the cheque of another man it stands on entirely the same footing as a bill of exchange or promissory note, which, according to 'Veal v. Veal,' 27 Beav. 303, may well be the subject of a 'donatio mortis causa.' For this purpose there is no difference between the cheque of another man and a bill of exchange or promissory note."[11] The donor's own promissory note would not be a pood "donatio mortis causa." The case to which Chitty, J., here refers is that of a promissory note of some other person held by the donor and delivered as a "donatio mortis causa." Ames says:[12] "It must be conceded that no action can be maintained by the donee against a party who executes or indorses a bill either as a gift 'inter vivos,' or as a 'donatio mortis causa.'" The donor's own promissory note is a mere promise to pay and not a gift of property. A note of another indorsed to the donee, or it would seem even if not indorsed, would be a good "donatio mortis causa."

[10] L. R., 27 Ch. D., 631.
[a] 12th Ed., 176.
[11] *Clement* v. *Cheesman*, 27 C. D., 631 (1884).
[12] *Ames Cases on B. & N.*, vol. 2, p. 377.

Cheque delivered as a gift inter vivos.—In "Bramley v. Brunton,"[13] the donor, in her last illness, gave her cheque to her granddaughter and it was presented for payment without delay and while the donor was living. The bankers had sufficient funds but did not pay the cheque because they doubted the authenticity of the signature and Sir John Stuart, V. C., held this a good gift "inter vivos," as everything had been done that could be done by the donor to make the gift complete. "The failure so far as the gift has failed through non-payment to this time occurred through the default of third parties whose duty it was to pay it."

CROSSED CHEQUES.

Mr. Justice Maclaren says that "the practice of crossing cheques did not prevail in Canada before the act, and it is not generally adopted now, as the drawer can protect himself by making a cheque payable to order since our parliament refused to adopt section 60 of the Imperial Act, which relieved a bank from responsibility for the genuineness or authorization of the indorsement on cheques drawn upon it."[14] The difference between the Imperial and the Canadian act on this subject is explained at page 157 (ante). The practice is a comparatively modern one in England and, as Mr. Justice Maclaren observes, is another illustration of the elasticity of the law merchant by which a custom obtains for itself judicial sanction or legislative recognition. A history of the origin and growth of the custom is given by Baron Parke in the case of "Bellamy v. Majoribanks," 7 Exch. at 402, and a summing up of his statement with further reference to the history of the practice will be found in Maclaren on Bills at page 398 (3rd ed.) A still further history of the mater by Mr. Z. A. Lash, K. C., written when counsel for the Canadian Bankers' Association, will be found in volume VI of the Journal of the Canadian Bankers' Association at page 166. The object of this paper was to point out to the bankers of Canada the advantages presented by the practice of crossing and

[13] L. R., 6 Eq., 275.
[14] *Maclaren on Bills*, 3rd Ed., 397.

induce the mercantile public to make more frequent use of the provisions of the statute. The learned King's counsel presents a lucid and interesting historical statement with references to the contemporary comment on the decisions and enactments on the subject, and after quoting the sections of our own statute which is substantially a re-enactment of the Imperial statute explains them as follows:—

"Therefore the provisions respecting crossed cheques would apply only to cheques drawn on an incorporated bank carrying on a business in Canada, and would not apply to cheques drawn on a private banker or a loan or other company not authorized to carry on a banking business.

"A cheque may be crossed in six ways:

(1) Thus:

(2) Thus: Bank

(3) Thus: Not negotiable

(4) Thus: Bank—not negotiable

(5) Thus: Bank of Montreal

(6) Thus: Bank of Montreal—not negotiable.

"In every case the crossing must be across the face.

"In the first four the crossing is general.

"In the fifth and sixth the crossing is special.

"In the fifth and sixth, parallel lines are not necessary, though if they be put on, the crossing would still be special.

"The difference between a general and special crossing is, that in the former the bank on which it is drawn must pay it to a bank, but may pay it to any bank; in the latter the cheque must be paid only to the bank named, or to the bank acting as its agent for collection.

"The effect of writing 'not negotiable' in the crossing is that the person taking the cheque does not acquire,

and cannot give, a better title to the cheque than the title of the person from whom he took it.

"The crossing in any of the six ways mentioned may be made by the drawer of the cheque. If the drawer issues it uncrossed, the holder may cross it in any of the six ways. If the cheque be crossed generally, *i. e.*, in any of the first four ways, a holder may cross it specially, *i. e.*, in either the fifth or sixth way, and if it do not bear the words "not negotiable" the holder may add those words; but if it once be crossed specially the crossing cannot be altered otherwise than by the addition of the words "not negotiable," except in the following two cases:—

"*a* The Bank to which it is crossed may again cross it specially for collection.

"*b* A crossed cheque may be reopened or uncrossed by the drawer writing between the transverse lines and initialing the same, the words "pay cash."

"If a cheque is crossed specially to more than one bank, except when crossed to another bank as agent for collection, the bank on which it is drawn must refuse payment thereof.

"The crossing is a material part of the cheque itself, and if it be added to or altered or obliterated the instrument is made void, except as against a party who has himself made, authorized or assented to the alteration, and subsequent endorsers; but if the alteration is not apparent and the cheque is in the hands of a holder in due course, such holder may avail himself of the cheque as if the crossing had not been altered, and may enforce payment of it according to its original tenor (see sec. 63 of the Act);* but if the cheque, when presented for payment, does not at that time appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorized by the Act, then the bank paying the cheque in good faith and without negligence is not responsible or under any liability, and the payment cannot be questioned merely because the cheque had been crossed, and because payment of it had been made contrary to the terms of the crossing, the same not being apparent at the time of presentment.

* S. 145 of the present Act.

"A bank cannot cross a cheque specially to itself except it be a (*a*) uncrossed, or (*b*) crossed generally, and in either case be sent to it for collection. It might be urged that, as holder, the bank could, under sub-secs. 2, 3 and 4 of sec. 76,* cross a cheque to itself, but the express authority given under sub-sec. 6 probably involves as a consequence that a bank may not cross a cheque to itself specially unless it has taken it for collection.

"The foregoing shows how and by whom cheques may be crossed and the nature of the various kinds of crossing.

"The nature and extent of the protection afforded to drawers and owners of crossed cheques, and to the banks collecting and paying them, will be best understood if an every-day transaction be traced through its various probable phases.

"Smith keeps his account with the Dominion Bank. He owes Brown $500, for which he sends him a cheque on the Dominion Bank payable to Brown's order. The cheque is not crossed, and it is lost or stolen, either before Brown receives it, or after he receives it, and before he endorses it. The finder or thief forges Brown's endorsement. He may succeed in obtaining payment direct from the bank, or he may succeed in transferring it to an innocent holder, who either receives payment direct from the bank, or deposits it for collection in the Traders Bank, of which he is a customer. The Traders Bank collects from the Dominion Bank, and accounts for the proceeds in the usual way. What are the rights of the respective parties, the cheque being uncrossed? Smith could repudiate the payment to the Dominion Bank. His indebtedness to Brown would remain undischarged. Brown could sue Smith for the $500, or Brown could, if the cheque had become his, sue the Traders Bank or its customer for converting the cheque, and get the $500 in that way. The Dominion Bank could, under chapter 10 of the Acts of 1879, get back the $500 from the Traders Bank, and that bank could, under the same statute, get back the $500 from its customer. Of course the $500

* S. 169 of the present Act.

would only go round once, *i.e.*, none of the parties would ultimately lose more than $500, assuming that all were able to pay. The loss would in the end fall on the Traders Bank's customer, and of course he, being the person who first took the cheque under the forged endorsement, is the proper one to bear the loss.

"What would be the rights of the respective parties were the cheque crossed?

"Neither the forger nor any other individual could obtain payment direct from the Dominion Bank, because, being crossed, payment could only be obtained by a bank, for should the Dominion Bank pay, in contravention of the crossing, it would, under section 78,‡ be liable to Brown, the true owner of the cheque, for any loss he might sustain owing to the cheque having been so paid; a remedy which Brown would not, if the cheque were not crossed, have against the Dominion Bank. Therefore at the outset difficulties are thrown in the forger's way; he might never be able to transfer the cheque to an innocent holder, and, during the time occupied in trying to do so, its payment might be stopped. This of itself is a great advantage to all parties. But suppose he succeeded in transferring the cheque, and suppose it were deposited in the Traders Bank and presented to and paid by the Dominion Bank as mentioned, what would be the effect?

"If the cheque had come into the hands of Brown, the payee, then, under section 79,* the Dominion Bank and Smith, the drawer, would respectively be entitled to the same rights, and be placed in the same position, as if payment of the cheque had been made to the true owner thereof; and, under section 81, (175) the Traders Bank does not incur any liability to Brown by reason only of having received payment of the cheque to which its customer had no title. The banks must of course act in good faith and without negligence.

"The effect therefore is that, as between Smith and Brown, and the Dominion Bank, the payment is good. Smith is relieved from any difficulty or anxiety; his debt to Brown has been paid; his relations with the bank are

‡ Now sec. 171.
* Now sec. 173.

unruffled, and he is not forced to commence litigation to protect his rights; and because the payment is good as between Smith and Brown the Dominion Bank is also relieved. The Traders Bank being merely a collecting agent for its customer is and should be relieved.

"In the case put there can be no question about the advantage to Smith resulting from the crossing of the cheque, and taken in connection with the difficulties thrown in the forger's way, and the case put being by far the most likely to happen in acual practice, a drawer, looking to his own interest only, should not hesitate, except for special reasons, to issue all his cheques crossed. Brown's remedy is now confined to his action against the Traders Bank's customer. This is eminently fair, as, of all the parties, this customer is the one who should bear the loss, and as between Brown and the others, Brown is the only one who should suffer the consequences of the loss or theft of the cheque, it having been in his hands, and the others having no control over its safe keeping. Brown, however, is not without protection, for, by adding to the crossing the words 'not negotiable,' if those words are not already there, he can, for all practical purposes in 99 cases out of 100, make the loss or theft of the cheque a matter of inconvenience only, not of loss. And in the great bulk of cases there is no practical reason against the addition by the payee, of these words, 'not negotiable.'

"Therefore not only is it to the advantage of the drawer that his cheques should be crossed, but it is also to the advantage of the holder.

"Should the cheque not have come into the hands of the payee, the payment by the Dominion Bank, though good as between it and Smith, would not be good as between Smith and Brown. This is of course only fair, as, till the cheque gets into Brown's hands, he has no connection at all with the transaction. I fancy, however, that it very seldom happens that a cheque does not come into the hands of the payee. This expression 'come into the hands,' does not mean that the cheque must be handled by the payee personally. If it were delivered to his agent it would be sufficient, and if under the circumstances surrounding a transmission by post, the post-office were the agent of Brown and not of Smith, the

cheque would come into Brown's hands within the meaning of this rule, as soon as the letter containing it is posted.

"I have purposely confined the above illustration to the case of a cheque payable to order. If it were payable to bearer, there could be no question about the advisability of having it crossed.

"I call attention to the difference between the expression 'in good faith and without negligence,' used in the sections under consideration, and the expression 'in good faith and in the ordinary course of business' used in the Act of 1897 respecting forged or unauthorized endorsements; the difference is important. Section 89 declares that 'A thing is deemed to be done in good faith, where it is in fact done honestly, whether it is done negligently or not.' Therefore, if there be good faith, and if the thing be done in the ordinary course of business, the protection of the of the Act of 1897 will not be lost, even though there be negligence, but under the crossed cheques sections, if there be negligence, the protection is gone, even though there be good faith, and though the transaction be in the ordinary course of business."

The learned writer, after a brief reference to the cases, closes with the following paragraph:—

"This subject is well worthy of attention by the Association, with a view to making the advantages of crossed cheques known to the commercial community, and thereby bringing about their adoption generally in Canada. The statute has been in force now for eight years, and very few merchants know of it. Those who do know do not understand it. If the banks act, the knowledge will soon become widespread. If the banks do not act, no one else will.

168. Where a cheque bears across its face an addition of,—

Cheque is crossed generally by the word "bank" between two parallel transverse lines, or by such lines simply, in either case with or without words not negotiable.

(a) the word "bank" between two parallel transverse lines, either with or without the words "not negotiable"; or

(b) two parallel transverse lines simply either with or without the words "not negotiable"; such addition constitutes a crossing, and the cheque is crossed generally.

Addition of name of bank makes a crossing specially to that bank.

(2) Where a cheque bears across its face an addition of the name of a bank, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed specially and to that bank. 53 V., c. 33, s. 75. [E. s. 76.]

May be crossed either way by drawer.

169. A cheque may be crossed generally or specially by the drawer.

Holder may so cross.

(2) Where a cheque is uncrossed, the holder may cross it generally or specially.

Holder may cross specially cheque crossed generally.

(3) Where a cheque is crossed generally, the holder may cross it specially.

Holder may add words not negotiable.

(4) Where a cheque is crossed generally or specially, the holder may add the words "not negotiable."

Bank may again cross specially to another bank.

(5) Where a cheque is crossed specially the bank to which it is crossed may again cross it specially, to another bank for collection.

Bank may cross specially to itself.

(6) Where an uncrossed cheque, or a cheque crossed generally, is sent to a bank for collection, it may cross it specially to itself.

Cheque may be uncrossed.

(7) A crossed cheque may be reopened or uncrossed by the drawer writing between the transverse lines, the words "pay cash," and initialing the same. 53 V., c. 33, s. 76. [E. s. 77.]

Reopening crossed cheque.—In the essay above referred to of Mr. Lash, K. C., he points out that this provision as to reopening a crossed cheque does not appear in the English act and he expresses the fear that it was inserted in our act without sufficient consideration of the consequences. He sees grave objections to it and very few advantages. If a cheque so treated should be presented for payment he would recommend the bank in every case to communicate with the drawer before paying. In his opinion the section should be repealed.

Cheque drawn to order crossed with words "account of M., National Bank," is not rendered non-transferable.

—A cheque was drawn payable to the order of J. F. Moriarty and was crossed by the drawer "account of J. F. Moriarty, National Bank, Dublin." Moriarty indorsed the cheque and sent it to the National Bank to be credited to his account, which was then slightly overdrawn. The cheque was sent to London and was dishonored, the drawer having countermanded payment on the ground of alleged misrepresentations. When sued on the cheque by the National Bank he contended that it had become non-negotiable by virtue of the crossing, that the cheque could only be paid to the account of Moriarty at the National Bank. The cheque was held to be negotiable and the bank was held to be a holder for value in due course on the authority of "McLean v. Clydesdale Banking Co."[15] Lindley, L. J., doubted whether a cheque once made payable to order or bearer could be made non-negotiable in any other way than under the provisions as to crossed cheques (see sec. 169 [4]). If it could be so made non-negotiable it must be by unambiguous words and those used here were not unambiguous. They amounted to nothing more than a direction to the National Bank to carry the amount of the cheque to Moriarty's account when they received it.[16]

Crossing, a material part of cheque.

170. A crossing authorized by this Act is a material part of the cheque.

May not be lawfully obliterated or altered except as provided.

(2) It shall not be lawful for any person to obliterate or, except as authorized by this Act, to add to or alter the crossing. 53 V., c. 33, s. 77. [E. s. 78.]

Where crossed to more than one bank, except as agent, bank drawn on shall refuse payment.

171. Where a cheque is crossed specially to more than one bank, except when crossed to another bank as agent for collection, the bank on which it is drawn shall refuse payment thereof. 53 V., c. 33, s. 77. [E. s. 79.]

[15] 9 Ap. C., 95.
[16] *National Bank v. Silke* (1891) 1 Q. B., 435.

Bank paying in such case or paying crossed cheque otherwise than to the bank to which it is crossed, liable to true owner for loss.

Proviso that if cheque does not appear to have been crossed, or to have had a crossing improperly obliterated or altered, bank paying without negligence not liable nor can payment be questioned.

172. Where the bank on which a cheque so crossed is drawn, nevertheless pays the same, or pays a cheque crossed generally otherwise than to a bank, or, if crossed specially, otherwise than at the bank to which it is crossed, or to the bank acting as its agent for collection, it is liable to the true owner of the cheque for any loss he sustains owing to the cheque having been so paid: Provided that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorized by this Act, the bank paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorized by this Act, and of payment having been made otherwise than to a bank or to the bank to which the cheque is or was crossed, or to the bank acting as its agent for collection, as the case may be. 53 V., c. 33, s. 78. [E. s. 79.]

Where bank pays without negligence and in good faith, the bank or drawer, as case may be, placed in same position as if cheque paid to true owner.

173. Where the bank, on which a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally to a bank, or, if crossed specially, to the bank to which it is crossed, or to a bank acting as its agent for collection, the bank paying the cheque, and if the cheque has come into the hands of the payee, the drawer shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof. 53 V., c. 33, s. 79. [E. s. 80.]

Taker of cheque crossed "not negotiable" cannot take or give better title than of person from whom taken.

174. Where a person takes a crossed cheque which bears on it the words 'not negotiable,' he shall not have and shall not be capable of giving a better title to the cheque than that which had the person from whom he took it. 53 V., c. 33, s. 80. [E. s. 81.]

Bank receiving payment of crossed cheque for customer in good faith and without negligence incurs no liability to true owner by reason thereof.

175. Where a bank, in good faith and without negligence, receives for a customer payment of a cheque crossed generally or specially to itself, and the customer has no title, or a fective title thereto, the bank shall not incur any liability to the true owner of the cheque by reason only of having received such payment. 53 V., c. 33, s. 81. [E. s. 82.]

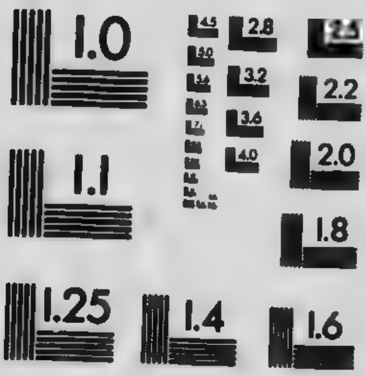
What constitutes negligence.—In the case of "Tate v. Wilts and Dorset Bank, Ltd.",[28] a bank permitted a party named Laidman to open an account, the first deposit in which consisted of a cheque crossed in his favor, payable to him under the name of Dixon. He explained to the bankers that he was conducting a business as a scrap and general merchant under the name of Dixon, and was the payee of the cheque. The cheque was given to him for scrap to be supplied to the drawer, but none was supplied and the cheque transaction was in fact a fraud on the part of Laidman. The drawer claimed the £25 which had been paid by their bankers on the cheque and contended that the defendants had been negligent, and the judge found "that they had acted negligently in collecting the amount of a crossed cheque for a stranger without due inquiry as to the title." It was held that negligence of this kind, even assuming apparently the soundness of the finding, would not affect the case.

In "Bissell & Co. v. Fox Brothers,"[28a] the plaintiffs had appointed a traveller whose duty it was to remit to them at the end of every week all cash, cheques and bills received. He continued to do this for some years, but in 1885 opened an account in his own name with the

[28] Journal of Can. Bankers' Ass'n, vol. 7, p. 65.
[28a] 53 L. T., 193.

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



defendant's bank and paid into this account without the sanction or knowledge of the plaintiffs various cheques received by him on account of the plaintiffs and payable to their order. These were indorsed by the traveller, per pro J. E. Bissell & Co., and were taken without any enquiry and placed to his credit as cash. Denman, J., held that the bankers had not acted without negligence and could not claim the protection of section 175 (E. 82): "The negligence contemplated in section 82 must mean the neglect of such reasonable precautions as ought to be taken with reference to the interests not of the customer who purports to have the authority, but of the principal whose authority he purports to have; the section being framed wholly with reference to the liability of the banker to the 'true owner' of the cheque and not with reference to his liability to his customer." This judgment was upheld by the court of appeal, stress being properly laid upon section 51 of the act, according to which "a signature by procuration operates as notice that the agent has but a limited authority to sign and the principal is only bound by such signature if the agent in so signing was acting within the limits of his actual authority."

In "Hamen's Lake View Central Limited v. Armstrong C."[28b] a cheque for £542 in favor of the plaintiffs was crossed generally and was paid by the company's secretary, H. Montgomery, to his private account with the defendant bankers, the indorsement being in the name of the company, either stamped or typewritten, followed by the signature, "H. Montgomery." The evidence showed a practice to indorse in this way, but according to the evidence of the chief accountant of the defendants, there was no instance known of any secretary of a limited company indorsing by himself a cheque payable to his company except for the purpose of the cheque being paid into the company's own banking account, and the bank should have taken note of this departure from this invariable practice. Having omitted to do so they were not without negligence and could not claim the protection of the section.

[28b] See Table of Cases for reference.

When is payment received by the bank for a customer?—Fine distinctions have been drawn in the interpretation of this phrase. The case of highest authority is the "Capital Counties Bank v. Gordon."[29] The respondent, who traded as Gordon & Munro, was the holder for value of crossed cheques drawn by various persons. He had a clerk named Jones who forged indorsements in the name of Gordon & Munro on these cheques and sent them to the appellant bank, where he had an account. Jones also indorsed them in his own name and the bank credited his account with the amount and he drew on his account while the amount of the cheques so paid stood to his credit. The bank manager dealt in the matter with perfect bona fides and without negligence, having no suspicion that anything was wrong. The case turns in great measure on the fact that the bank placed the amount of the cheques to the credit of Jones when they were paid in and he was allowed to draw upon his account increased by them as above stated. The cheques were duly honored and the appellant bank received their amounts in due course from the banks on which they were drawn. Were they received by the appellants for a customer? If so, in the absence of negligence, the bank incurred no liability to Gordon, " the true owner." Lord Macnaghten said: " At first sight there is not much difference between the case of a bank which at once credits a customer with the face value of a cheque paid in to his account and allows him to draw against his credit balance thus increased, and the case of a bank which without crediting the customer with the value of a cheque before collection allows him to overdraw his account in view of the anticipated credit. In each case it was said the credit is only provisional, whether entered in the customer's account or not. In each case it was said payment when received is received for the customer. And in a sense that is true. Then it was urged with some force that practically the only result of upholding the decision under appeal will be to compel some bankers to keep a double set of books where now only one set is required, and thus to impose upon the bankers a good deal of extra and perhaps unneces-

[29] 1903 A. C., 240.

sary trouble. But the protection conferred by s. 82 is conferred only on a banker who receives payment as a mere agent for collection. It follows, I think, that if bankers do more than act as such agents they are not within the protection of the section. It is well settled that if a banker before collection credits a customer with the face value of a cheque paid into his account the banker becomes holder for the value of the cheque. It is impossible, I think, to say that a banker is merely receiving payment for his customer and a mere agent for collection when he receives payment of a cheque of which he is the holder for value."

The following passage from the judgment of Collins, M. R., in the Court of Appeal, was also quoted by Lord Macnaghten with approval. "The protection afforded by s. 82 must," he says (1), "be limited to that which is necessary for the performance of the duty which by the legislation as to crossed cheques was imposed upon bankers. If bankers deal with crossed cheques in the ordinary way in which bankers dealt with cheques before the legislation as to crossed cheques and in which they deal with cheques other than crossed cheques at the present time, namely, by treating them as cash, and upon receipt of them at once crediting the customer with the amount of them in the ordinary way instead of making themselves a mere conduit pipe for conveying the cheque to the bank on which it is drawn and receiving the money from that bank for their customer, I think they are collecting the money, not merely for their customer, but chiefly for themselves, and therefore are not protected by s. 82."

A case had previously been decided of "Great Western Railway Company, Limited v. London & County Banking Company, Limited,"[30] in which one, Huggins, who had for many years been a rate collector in the employment of the Wantage Rural District Council and other similar bodies had been in the habit of cashing cheques for fifteen or twenty years through the defendants' branch at Wantage, distributing the money received among the local bodies to whom he had to account. He kept no account with the defendants and had no pass-book, his transactions with the defendants

[30] 16 Times, L. R., 453.

being completely disposed of in each case when he brought the cheques. On one occasion he falsely pretended to plaintiffs that a rate had been made and that plaintiffs owed in respect thereto £142 10s., for which they therefore gave him their cheque drawn on the head office of the London Joint Stock Bank in favor of Huggins, or order, crossed generally and marked "not negotiable." Huggins handed this across the counter at the Wantage branch of the defendant bank and the clerk handed out a paying slip which Huggins signed, which contained no reference to the cheque itself, but purported to show a payment into the bank of £142 10s., a payment to Huggins of £117 10s. and a payment to the credit of the District Council's account at Huggin's request of £25. The trial judge held that the business effect of this was that the bank handed to Huggins the amount of the cheque, £142 10s., which he then and there disposed of to his own use. The defendant bank then crossed the cheque to itself and sent it to their head office for collection. Bigham, J., held that, although under the section corresponding to section 174 of this statute it is provided that when a person takes a crossed cheque bearing the words, "not negotiable," he shall not have and shall not be capable of giving any better right than that of the person from whom he took it, yet under section 82, (175 of this act,) the bank was protected as there had been no negligence. Huggins was a customer and the bank had received the amount of the cheque for Huggins. Sir John Paget,[31] referring to the view of Bigham, J., in this case, that the London & County Bank advanced £142 10s. to Huggins on the credit of the cheque, then received payment of it for him and, ac[illegible]g on his behalf, repaid themselves the amount and p[illegible]5 to the credit of the District Council, expresses th[illegible] opinion that this view is fantastic and not a reasonable deduction from the facts. But the decision is affirmed by the Court of Appeal, consisting of A. L. Smith, Vaughan Williams, and Romer, L. JJ. Vaughan Williams, L. J., however, concurred reluctantly, if at all, in the view that the money had been received for Huggins, and it seems wholly inconsistent with the "ratio decidendi" of the House of Lords case. It is not surprising, therefore, to

[31] 8 J. C. B., 51.

find Sir John Paget adhering to his views notwithstanding the judgment of the divisional court.[32]

In "Clarke v. London & County Banking Company,"[33] it was held by the Queens Bench Division that where a crossed cheque is delivered to a banker by a customer for collection and the banker receives payment of it and places the amount to the customer's account, the fact that the customer's account is overdrawn at the time does not make such receipt of payment by the banker any the less a receipt of payment for the customer within the meaning of sec. 82 (175 of this act), or disentitle the banker to the protection of that section. This also seems difficult to harmonize with the language of Lord Macnaghten in the "Capital Counties Bank v. Gordon"; "it is well settled that if a banker before collection credits a customer with the face value of a cheque paid into his account the banker becomes a holder for value of the cheque. It is impossible, I think, to say that a banker is merely receiving payment for his customer and a mere agent for collection when he receives payment of a cheque of which he is the holder for value."

Protection applies only in case of cheques crossed before received by bank.—This point was decided in the case last referred to in which some of the cheques on which plaintiffs based their claim were not crossed when taken by the bank. Lord Lindley said it appeared to him that section 82 (section 175 of our act), "would be deprived of all meaning if it was held to apply to cheques not crossed when they came to the hands of the bank seeking the protection of that section."

Protection applies only where money is received by bank as a banker.—The distinction here pointed to was brought out by the case of "Gillespie v. International Bank of London,"* in which the bank had presented a crossed cheque in the ordinary way and had it dishonoured and protested. The bank was then asked to enforce payment of it on the assurance that the indorsee

[32] See 8 J. C. B., 352, et seq.
[33] 1897, 1 Q. B., 552.
* Referred to in 8 J. C. B., p. 51, as reported in Journal of Bankers' Institute, vol. 9, p. 197.

had given value for it and it took the matter in hand and recovered payment not from the bank on which the cheque was drawn but through their solicitors, and presumably under threat of legal proceedings from the drawer of the cheque. Sir John Paget, then Mr. Paget, commenting on this case[34] in one of the Gilbart lectures, regards it as an insult to common sense to contend that in such a case the bank so receiving payment was within the protection of the statute. "True, as I said, sec. 82" (175 of this act) "does not use the word 'collecting,' but it carefully limits its protection to a banker receiving payment of a crossed cheque for a customer. And not only the wording of this particular section, but the whole bearing of the crossed cheques sections makes it perfectly impossible to stretch their application to anything outside the strict relation of banker and customer as ordinarily understood in banking business. Whenever the act talks of a banker doing this, that, or the other, even where it does not emphasize it as it does here by importing the correlative term customer, you must read 'banker,' as meaning a banker acting in his capacity as banker and not in any other capacity, business or private. . . . There may be diversities of opinion as to what is a customer, there may be latitude as to what is collecting, but looking at the whole scheme of the crossed cheques sections, I have not the slightest hesitation in saying that no banker can ever be protected under section 82 (175), where he has received payment from anybody except the banker on whom the crossed cheque is drawn."

[34] 8 J. C. B., 51.

PART IV.

PROMISSORY NOTES.

Promissory note defined.

176. A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer.

Instrument payable to maker's order is not a note till endorsed.

(2) An instrument in the form of a note payable to the maker's order is not a note within the meaning of this section, unless it is endorsed by the maker.

Pledge of security with power to sell does not invalidate note.

(3) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof. 53 V., c. 33, s. 82. [E. s. 83.]

Cross references.—Nearly all the terms used in this definition of a promissory note occur in the definition of a bill of exchange, and the cases in reference to bills of exchange are applicable to promissory notes in so far as the terms of the definition are identical. The only difference between the two that calls for comment is that while a bill of exchange contains an order, a promissory note must contain a promise. The promise like the order must be unconditional; it must be in writing and must be signed by the maker, as the bill is by the drawer; the payment must be stipulated for on demand, or at a fixed or determinable future time and the amount payable must be in money; the payee must be a specified person, or his order, or the note must be payable to bearer. The law applicable to all these requirements is precisely the same for promissory notes as for bills of exchange and it is expressly provided by the act (section 186), that subject to the provisions of this part of the act, all the provisions relating to bills of exchange apply with the necessary modifications to promissory notes. Those modifications are set out in the section referred to.

Sealed instrument is not a note unless maker is a corporation.—The act provides, section 5 (ante p. 15), that in the case of a corporation where by the act any instrument is required to be signed it is sufficient if the writing is duly sealed with the corporate seal, but nothing in the section is to be construed as requiring the bill or note of a corporation to be under seal. This provision leaves the law as it was with respect to the note or bill of an individual, and it had been ruled that an instrument in the form of a note but under the seal of the maker was not his promissory note.[22]

I. O. U. is not a note; nor "Due," nor "Good"; but I. O. U. "to be paid" is a note.—The section defines a promissory note as an "unconditional promise in writing made by one person to another, &c." This, it will be observed is more than a mere acknowledgement of indebtedness from which a promise to pay would be implied by law. Therefore, an I. O. U. is not a promissory note within the definition. In an old case in 1827,[23] the note was in this form:—"I do acknowledge myself to be indebted to A. in ——— pounds, to be paid on demand, for value received." The court, proceeding on the analogy of a lease, in which these words would amount to a covenant, held that here they amounted to a promise to pay, and therefore the document was a good note within the statute. From this it follows that if, as in the case of "Brooks v. Elkins,"[24] the I. O. U. is followed by these words, for example, "I. O. U. twenty pounds to be paid on the 22nd instant," the document is a promissory note, though the court was not required to determine the point in that case,[25] which we shall be obliged to refer to elsewhere as to the ruling that a document in the form, "Due J. G., or bearer, $482, payable fourteen days after date," was so far as this requisite was concerned, a promissory note on the ground that there could be no difference between "payable" and "to be paid" or "to pay," and that the words, "payable in fourteen days," were certainly words of promise.[26]

[22] *Wilson v. Gates*, 16 U. C. Q. B. 278.
[23] *Casborne v. Dutton*, Selwyn's N. P., 13th Ed., 329.
[24] M. & W., 72.
[25] 29 U. C. Q. B., 535.
[26] Ib. 537.

Implied promise will not constitute document a note.—It is sometime loosely said that an implied promise is enough. For example, in "Ellis v. Mason,"[27] this curious form of words was used: "John Mason 14th Feb., 1830, borrowed of Mary Ann Mason, his sister, the sum of 14 pounds, in cash, as per loan, in promise of payment of which I am truly thankful for and shall never be forgotten by me, John Mason, your affectionate brother. 14 pounds." This, it was humorously suggested by Martin as counsel, was an undertaking to pay in thanks. The writing was certainly informal and ungrammatical, but the words used clearly enough imported a promise to repay the borrowed money. The expressions used by Williams, J., in deciding the case are consistent with either of two theories, and his reference to the express statement in the document of an advance of a loan of money, coupled with his suggestion of an implied undertaking to pay it, would point to the quasi contract arising from the fact of the loan rather than to the expression of a true contract in the inartificial terms of the document. It is probable that it was the latter and not the former that he had in mind as the ground of his decision, but the language used in the judgment points to a possible misconception against which it is necessary to guard. An "implied promise," in the sense in which those words are used by English lawyers, is not sufficient. From the fact of a loan of money is implied by law the promise to repay the money on demand. From the fact of a debt is implied by law the promise to pay the debt at maturity. The test is this. Look at the document itself. If, by a process of construction, you can gather from it, no matter how informal, irregular or ungrammatical it may be, the intention to express a promise to pay, it is enough. If the promise to pay can only be arrived at, not by a process of construction, but as a legal consequence of the facts stated in the document, is not enough. Thus, in the cases referred to in the preceding note, the expression "to be paid" in the gerundive, and the equivalent expressions "payable" and "to pay," amounted to the statement by the signers

[27] 7 Dowl., 598.

that they would pay the amounts respectively. "In promise of payment of which I am truly thankful for," was an ungrammatical manner of expressing a sentiment of gratitude, coupled with a promise of payment.

On the other hand, consider the very strong case of "Taylor v. Steele":[28] "Received from Mrs. Barbara Taylor the sum of 170 pounds, for value received, for which I promise to pay her at the rate of 5 pounds per cent from the above date. A. N. Steele," or the still stronger case of "Melanotte v. Teasdale":[29] "I. O. U. 45 pounds 13 shillings which I borrowed of Mrs. Melanotte, and to pay her five per cent till paid." It might well have been supposed that a promise to pay interest "till paid," particularly when coupled with the statement that the money had been borrowed, would have warranted the court in collecting from the document itself the expression of a promise to pay the principal, but it was not so held. It is difficult to resist the impression that if in these cases, or at least in the latter case, the plaintiff had been seeking to recover the amount of a promissory note and the defendant had been resisting payment on the ground that the document was not a promissory note, the court would have discovered some way of construing the document as importing a promise to pay. The boot was on the other leg. It was in each case the defendant who sought to establish the proposition that the document was a promissory note and was therefore invalid for want of a stamp, but the court repelled the technical defence and decided according to the justice of the case. "Hard cases make bad law," but it would be rash to say that either of these cases is badly decided. We must, at all events, regard it as settled by the case last referred to and by the later case of "Hyne v. Dewdney,"* "Borrowed this day of Mr. John Hyne, Stonehouse, the sum of 100 pounds on Naval Bank," that the term "borrowed" is not sufficient to import a promise to pay within the meaning of the requirement that a promissory note must contain a promise.

The American cases collected by Mr. Ames on this subject are interesting and important. One only will be

[28] 16 M. & W., 665.
[29] 13 M. & W., 216.
* 21 L. J., 278.

referred to here which contains a clearer statement of the distinction here attempted than will be found in any of the English cases. "In Currier v. Lockwood,"[29a] the plaintiff sued on a "due bill" in the following form: "17.14. Due Currier & Barker seventeen dollars and fourteen cents, value received." Seymour, C. J., of the Supreme Court of Connecticut, said: "The writing given in evidence in this case is a due bill and nothing more. Such acknowledgements of a debt are common and pass under the name of due bills. They are informal memoranda sometimes here as in England in the form, I. O. U. They are not promissory notes which are classed with specialties in the Statute of Limitations. The law indeed implies a promise to pay from such acknowledgements, but the promise is simply implied and not express. It is well said by Smith, J., in 'Smith v. Allen,' 'where a writing contains nothing more than a bare acknowledgement of a debt, it does not in legal construction import an express promise to pay; but where a writing imports not only the acknowledgment of a debt but an agreement to pay it, this amounts to an express contract. . . . That case adopts the correct principle, namely, that to constitute a promissory note there must be an express as contradistinguished from an implied promise.'"

Lien notes.—A reference has been made on a previous page to this sort of instrument (ante p. 62.) The cases seem to be conflicting as will appear from Mr. Justice Maclaren's note at page 410 of his third edition.

Note to maker's order not within definition until indorsed.—This is expressly provided in the statute, but it would follow from the definition which requires that the instrument should contain a promise by one person to another. There is no promise to any other person until the document is indorsed by the maker. When it is indorsed in blank it becomes a note payable to bearer. If indorsed specially it becomes a note payable to the indorsee, or his order. Mr. Justice Maclaren cites several cases to this effect decided before the passing of the Bills of Exchange Act.[30]

[29a] 40 Conn., 349 1 Ames cases B & N., 21
[30] *Maclaren on Bills*, 3rd Ed., p. 412.

Pledge of collateral security with authority to sell, &c.—This, under the statute does not invalidate the note as a note. Mr. Justice Maclaren says[31] that this sub-section is a modification of the rule in another section of the act, that an instrument which orders anything to be done in addition to the payment of money is not a bill, citing "Wise v. Charlton,"[32] and "Fancourt v. Thorne."[33] But in both these cases the instruments were held to be good promissory notes. There was not, however, in either of these cases any direction or provision as to the disposal of the collateral security.

Does the pledge of security pass on a negotiation?—This question Judge Chalmers says has been touched upon, but not decided, and he refers to the case of "Storm v. Stirling,"[35] In that case the promise was to pay the secretary for the time being of the Indian Landable, &c., Society, and it was held that the payee was uncertain. The authority of the case in this respect has been destroyed by the express provision of the act, section 19 (3), ante p. 72. The question whether the security would pass to the transferee was unfortunately not decided. There was a promise in this case to pay any deficiency arising after the sale of the property pledged as security. Mr. Ames seems to consider such an agreement annexed as an incident to the bill or note, as not being negotiable.[36] He says: "If a wholly independent and non-negotiable agreement is incorporated in the same instrument with a bill or note, the whole instrument is thereby rendered non-negotiable, e. g., a promise to pay money and also to deliver up horses and a wharf," (Martin v. Chaunton.)* "But an agreement relating to the bill or note itself annexed to it merely as an incident, although not itself negotiable, will not destroy the negotiability of the bill or note, e. g., a promise to pay any deficiency arising upon a sale of property pledged as security for the payment of the bill or note."

[31] *Maclaren on Bills*, 3rd Ed., p. 413.
[32] 4 Ad. & E., 786 (1836).
[33] 9 Q. B., 312 (1846).
[35] 3 E. & B., 832 (1854).
[36] 2 *Ames cases*, 829.
* Stra., 1271.

Statement that note is given as collateral security destroys negotiability.—This principle has already been expounded and the cases are referred to in a previous note[37] (ante p. 32). The contrary seems to have been decided in Australia. See Maclaren on Bills, 3rd edition, p. 413.

Innocuous additions to a promissory note.—Mr. Justice Maclaren cites cases to the effect that an instrument providing for the payment of money by instalments, the whole to become due on default of payment of one instalment was a good promissory note, although a clause was added as follows; "No time given to or security taken from, or composition arrangements entered into with either party hereto shall prejudice the rights of the holder to proceed against any other party; "Yates v. Evans,"[39] "Kirkwood v. Carroll."[40]

Inland note defined.

177. **A note which is, or on the face of it purports to be, both made and payable within Canada, is an inland note.**

(2) **Any other note is a foreign note. 53 V., c. 33, s. 82 (4.) [E. s. 83.]**

Cross reference.—The definition of inland and foreign bills of exchange will be found at page 103, (ante). The note on that page as to the importance of the distinction between inland and foreign bills is equally applicable to the distinction between inland and foreign notes.

Delivery necessary to complete note.

178. **A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer. 53 V., c. 33, s. 83. [E. s. 84.]**

Delivery.—This term is defined in section 2 (f) ante, as the transfer of possession, actual or constructive, from one person to another, and a note on constructive possession will be found on the same page, (ante p. 9.)

[37] See *Daniel*, sec 836, 20 O. R. 142.
[38] *Maclaren on Bills*, 5th Ed., p. 413.
[39] 61 L. J. Q. B., 446; 66 L. T. N. S., 432 (1892).
[40] 1903, 1 K. B., 531.

Note may be made by more than one person jointly or jointly and severally.

179. A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally, according to its tenor.

"I promise," &c., signed by two is joint and several.

(2) Where a note runs "I promise to pay," and is signed by two or more persons, it is deemed to be their joint and several note. 53 V., c. 33, s. 84. [E. s. 85.]

Difference between law of Quebec and other provinces on this subject.—Mr. Justice Maclaren has the following valuable note on the difference between the law of Quebec and that of the other provinces with reference to joint obligations.[17]

"This section is likely to bring up some interesting questions on account of the difference between the law of Quebec and that of the other provinces as to the nature of a joint contract or joint liability, as distinguished from that which is joint and several.

"Under the French law in force in Quebec, where several persons are jointly liable for a debt, each of them is liable for an equal fractional part to the creditor, whatever may be their respective rights as against each other. Thus, if two are jointly bound, each is liable for one-half; if there are three, each is liable for one-third, and so on; and no one of them, by the death of his co-debtor or otherwise, becomes liable for more. The advantage to a creditor in having a joint contract instead of so many separate contracts is that he may sue all in one action, obtaining a separate condemnation of each for his equal share. See Pothier on Obligations, No. 165; 17 Laurent, Nos. 274, 280. An obligation is presumed to be joint, unless expressly declared to be joint and several. This rule does not apply to commercial transactions, where the presumption is in favor of the liability being joint and several: C. C. Art. 1105.

"Under English law, on the other hand, each joint debtor is liable to the crditor for the whole. If one dies, his representatives are not liable for any part to the creditor. If the creditor does not sue all who are alive and in the country, those who are sued might,

[17] *Maclaren on Bills*, 3rd Ed., p. 415.

upon a plea in abatement, under the old system of pleading, or by a motion under the Judicature Act, have proceedings stayed, until the living joint debtors who are in the country are made parties. A judgment taken against some of the joint debtors frees the others from all liability: 'King v. Hoare,' 13 M. & W. 494 (1844); 'Kendall v. Hamilton,' 4 App. Cas. 504 (1879); 'Hammond v. Schofield' (1891), 1 Q. B. 453; 'Hoare v. Niblett' (1891), 1 Q. B. 781; 'Toronto v. Maclaren,' 14 Ont. P. R. 89 (1890); 'McDonald v. McGillis,' 33 N. S. 244 (1900); Leake on Contracts, pp. 295-6.

"In Ontario by R. S. O. c. 129, s. 15, and in Manitoba by R. S. M. c. 170, s. 61, the common law rule as to joint debtors has been modified by providing that in case one or more of them dies his or their representatives may be proceeded against as if the contract had been joint and several."

Quebec cases further dealt with.—In Mr. Justice Maclaren's note[18] already mentioned the author refers to a Quebec case of "Crepeau v. Beauchesne," Q. R. 14 S. C. 495 (1898), in which one of two joint makers was held liable for the whole amount of a note as having incurred a joint liability as understood in English law. "In a later case of 'Noble v. Forgrave,' Q. R. 17 S. C. 234 (1889), it was held that section 8 of the amending act of 1891 had introduced into Quebec the law of England on this point, modifying as to bills and notes the provisions of article 1105 of the Civil Code which declares that in commercial matters the liability is presumed to be joint and several. The two makers were consequently condemned jointly, that is, each for one-half. Before the act the decisions in Quebec were conflicting. After the abolition of the distinction between traders and non-traders with regard to negotiable notes it was generally considered that every negotiable note was a mercantile transaction and that under Art. 1105 C. C., the makers were jointly and severally liable. "Perreault v. Bergevin," 14 R. L. 604 (1886). In "Malhiot v. Tessier," 2 R. L. 625 (1870), however, it was held that two farmers who had signed a note were liable only jointly and this doctrine has been confirmed by 'Drouin v. Gauthier.'" In

[18] *Maclaren on Bills*, 3rd Ed., p. 416.

the case last named, Q. R. 12 Q. B. 442 (1903), the superior court condemned the members of a firm of advocates jointly and severally on a firm note on the ground that it was a commercial matter. This was reversed on appeal on the ground that a legal partnership is a civil and not a commercial partnership, and that under section 23 *b* the firm signature was equivalent to the signature of all the partners. The liability was consequently held to be merely joint and not joint and several.[19].

Incidents of joint obligation not affected by Bills of Exchange Act.—As indicated in the foregoing notes the common law rule as to joint debtors has been modified by legislation in Ontario so that in the case of one of two or more joint debtors dying the representatives may be proceeded against as if the contract had been joint and several. In "Cook v. Dodds"[20] it was contended that this legislation could not affect the liability of parties on a promissory note, or at least this point is dealt with in the judgment of the court where Meredith, C. J., says: "The objection based upon the promissory note being a joint one is not, in my opinion, entitled to prevail. The Bills of Exchange act does not deal with the consequences which are to flow from the character which, according to its provisions, is attached to the promise which a bill or promissory note contains. These consequences in my opinion fall to be determined according to the law of the province in which the liability is sought to be enforced, and, inasmuch as in this province the common law rule as to joint contracts has been superseded by statutory enactment, R. S. O. 1897, Ch. 129, sec. 15, the provisions of the latter are to govern in determining the right of the respondent to sue in this province."

Joint and several.—The effect of a joint and several note of two or more persons is the same as if two or more separate notes were given as well as the joint note. So the case is stated by Cave, J., in re Davison,* but of course this is an imperfect statement without the qualification

[19] The author is indebted to Mr. Justice Maclaren for the references to these Quebec cases, to which he has not access.
[20] 6 O. L. R., 608.
* 13 Q. B. D., 53.

that they must all be understood to have been given for the same consideration. The consequence is that, unlike the case of a joint obligation which is not several as well as joint, a judgment against one or more of the debtors is no bar to proceedings against the others.

"I promise to pay," signed by two or more.—This was decided at an early date to constitute a joint and several obligation, the use of the singular number importing that intention. The earliest case cited by Mr. Justice Maclaren is "March v. Ward," Peake, 177 (1792). See however, "ex parte Buckley," 14 M. & W. 469. In that case the note was as follows:—

I promise to pay the bearer on demand, five pounds, here or at Messrs. (W. D. L. C. & Co.), bankers, London, value received.

For John Clarke; Joseph Phillips and
Richard Mitchell, Thomas Smith.
"Richard Mitchell."

This was held to be the promise of one partner for himself and the other three partners. "No doubt the instrument was intended to bind the firm, and as he had authority as a partner to do it, it had that effect." I think we must certify our opinion to the Lord Chancellor, "that there was no separate right of action upon any of these notes." (Per Parke, B.) A previous case of "Hall v. Smith,"* deciding the very opposite to this was expressly overruled by this case.

"I, John Brown, promise to pay," signed also by another.—Chalmers suggests[21] that possibly a note signed in this form would be held to be the note of John Brown only, and that the other signatory would only incur the liabilities of an indorser to a holder in due course under the proviso in section 131.

* 1 B & C., 112.
[21] *Chalmers on Bills*, 6th Ed., p. 271.

Endorsed note on demand must be presented in reasonable time from endorsement, having regard to nature of instrument, &c.

180. **Where a note payable on demand has been endorsed, it must be presented for payment within a reasonable time of the endorsement.**

(2) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case. 53 V., c. 33, s .85. [E. s. 86,]

Otherwise endorser discharged; proviso as to note held as collateral or continuing security.

181. **If a promissory note payable on demand, which has been endorsed is not presented for payment within a reasonable time the endorser is discharged: Provided that if it has, with the assent of the endorser, been delivered as a collateral or continuing security it need not be presented for payment so long as it is held as such security. 53 V., c. 33, s. 85. [Cf. E. s. 86.]**

Reasonable time.—This expression occurs in other places in the act. See comments at page 264, ante, and following pages.

Demand note not deemed overdue so as to affect holder with equities, by reason of not being presented in reasonable time.

182. **Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had not notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue. 53 V., c. 33, s. 85. [E. s. 86.]**

When is · demand note overdue so as to subject holder to equities?—This question is not directly answered by this section. The statement of the text is merely a negative one that a note payable on demand is not to be deemed overdue for the purpose of affecting the holder with defects of title, merely because it appears that a reasonable time for presenting for payment has elapsed since its issue. A previous section, however, (s. 70, p. 274), enacts that a bill payable on demand is deemed to be overdue within the meaning and for the purposes of

affecting the holder with equities when it appears on the face of it to have been in circulation for an unreasonable length of time, and that what is an unreasonable length of time for this purpose is question of fact. The probable intention of the statute is, therefore, to make a different rule for notes payable on demand from the one that governs bills of exchange. The question was in great doubt when Judge Chalmers wrote his digest, and in Article 282,[22] he said: "It is uncertain when a promissory note payable on demand and not known to have been dishonored is to be deemed overdue for the purpose of affecting the holder with equities of which he had no notice when he took it." His illustration was that of a note payable on demand with interest to C., or order, indorsed by C. to D. ten years after its date. "D. has not taken an overdue note. He holds it free from equities between the maker and C.", for which he cites "Brooks v. Mitchell."[23] In this case Parke, B., said: "I cannot assent to the argument urged on behalf of the plaintiff. If a promissory note payable on demand is after a certain time to be treated as overdue, although payment has not been demanded, it is no longer a negotiable instrument. But a promissory note payable on demand is intended to be a continuing security. . It is quite unlike the case of a cheque which is intended to be presented speedily." Mr. Ames says[24] that the doctrine that a demand note is regarded as an overdue note in the hands of the transferee, unless the transfer was made within a reasonable time obtains generally in the United States. He cites American cases for a fine distinction between a note on demand and a note containing no time of payment, saying that the latter being regarded as immediately due, cannot be transferred so as to give the transferee a greater interest than the payee himself has. This distinction, whatever may be the authority for it, would not be followed here. The statute has made no distinction between a note expressed to be made payable on demand and a note in which no time is mentioned. As Mr. Justice Maclaren says,[25] "A promissory note pay-

[22] *Chalmers' Dig.*, 293.
[23] 9 M. & W., 15.
[24] *Ames Cases on B. & N.*, vol. 1. p. 783n.
[25] *Maclaren on Bills*, 3rd Ed., p. 421.

able on demand with interest is a present debt, and 'at maturity,' as soon as given." It is an anomaly that a note payable on demand is due without any demand, but this was settled long ago by the ruling that the writ is a demand.

Where place of payment named in body of note it must be presented there.

183. Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place.

Maker not discharged by omission to present on due date, but if action brought before presentation, costs discretionary.

(2) In such case the maker is not discharged by the omission to present the note for payment on the day that it matures; but if any suit or action is instituted thereon against him before presentation, the costs thereof shall be in the discretion of the court.

If no place named in body of note, presentment not needed to charge maker.

(3) If no place of payment is specified in the body of the note, presentment for payment is not necessary in order to render the maker liable. 53 V., c. 33, s. 86. [E. s. 36.]

Where the note is made payable at particular place can action be brought against maker without presentation there.—As already stated at page 299, the Supreme Court of Nova Scotia has decided this question in the negative upon a narrow analytical reading of the terms of the section and without having regard to the long history of the question, briefly summarized at page 129 (ante.) The clause added to the bill by the Senate is responsible for the mistake, assuming it to be such, of the Nova Scotia court. The Imperial act provides that where a promissory note is in the body of it made payable at a particular place it must be presented for payment at that place in order to render the maker liable. The Senate added the words but the maker is not discharged by the omission to present the note for payment on the day that it matures, etc., from which it could be plausibly assumed that it was only intended to cure the failure to present on the day the note matured and not to make it possible to bring an action without any presentation at all at the place named. The words that follow, however, it is submitted, should have been held to make the matter clear; "but if any suit or action is

instituted thereon against him before presentation the costs thereof shall be in the discretion of the court." The Nova Scotia court held that in such case the plaintiff must fail and it was ingeniously suggested that the discretion given as to costs was for the purpose of enabling the court to give the plaintiff costs of the action although he had failed, if the failure was because of the non-presentment. It is more reasonable to read the statute as it is read by Armour, C. J., in Merchants' Bank of Canada v. Henderson."[28] "The effect of this provision seems to me to be that it is still necessary in order to charge the indorser that such a note should be presented for payment at the particular place on the day it falls due; but that to charge the maker, it is unnecessary that it should be so presented, but that it may be so presented at any time before action brought, and that an action may be brought upon it against the maker even without any presentation at the particular place at the risk of the plaintiff being obliged to pay the costs of such action in case the maker shall show that he had the money at the particular place to answer the note when the note fell due and thereafter." The opinion thus expressed is an "obiter dictum," the note having been presented at the proper place, though not until shortly before the action.

Presentment for payment requisite to make endorser liable.

184. Presentment for payment is necessary in order to render the endorser of a note liable.

Must be at place named in body of note.

(2) Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an endorser liable.

Otherwise when in memorandum, presentment to maker elsewhere is sufficient.

(3) When a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the endorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice. 53 V., c. 33, s. 86.

[28] 28 O. R. at 365 (1897).

Presentment necessary in order to render indorser liable.—The rules as to the presentment required in order to render the indorser liable are the same for promissory notes as for bills of exchange and will be found at page 276 ante, and following pages. The present section is required merely for the purpose of settling the law as to the place at which presentment must be made in the case of a note made payable at a particular place and of distinguishing between such a specification when contained in the body of the note and when in a memorandum only.

Place named in body of note is part of the contract; Maclaren says "that where the place of payment is named in the body of the note it is a part of the contract citing 'O'Brien v. Stevenson,' 15 L. C. R. 265 (1865). and 'Howes v. Bowes,' 16 East. 112 (1812) Where it is merely indicated in a foot-note or some other part of the note it has been a disputed point whether it is part of the contract. The affirmative has been held both in England and the United States."[37] A number of cases are cited both for and against this proposition and the author adds, "The act recognizes such a memorandum, but apparently not as part of the contract as presentment at the place indicated is made optional."

Maker of note engages to pay according to tenor and is precluded from denying to holder in due course existence of payee and his then capacity to endorse.

185. **The maker of a promissory note, by making it,—**

(a) engages that he will pay it according its tenor;

(b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse. 53 V., c. 33, s. 87. **[E. s. 88.]**

Maker's estoppels.—These are essentially the same as those of the acceptor of a bill of exchange, and they cease at the same point. Thus the maker while estopped from denying to the holder in due course the payee's existence and capacity to indorse does not warrant his authority to endorse and is not estopped from denying it.

[37] *Maclaren on Bills*, 3rd Ed., p. 425.

Provisions as to Bills of Exchange apply generally to notes.

186. Subject to the provisions of this Part, and except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes.

Maker corresponds to acceptor, and endorser of note to drawer of accepted bill payable to drawer's order.

(2) In the application of such provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the endorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order.

Provisions relating to presentment for acceptance: acceptance, acceptance supra protest and bills in set do not apply to notes.

(3) The provisions of this Act as to bills relating to,—

(a) presentment for acceptance;

(b) acceptance;

(c) acceptance supra protest;

(d) bills in a set

do not apply to notes. 53 V., c. 33, s. 8. [E. s. 89.]

Protest of foreign note not necessary except to preserve liability of endorsers.

187. Where a foreign note is dishonored, protest thereof is unnecessary, except for the preservation of the liabilities of endorsers. 53 V., c. 33, s. 88. [Cf. E. s. 89.]

SCHEDULE.

FORM A.

NOTING FOR NON-ACCEPTANCE.

(Copy of Bill and Endorsements.)

On the 19 , the above bill was, by me, at the request of presented for acceptance to E. F., the drawee, personally (*or*, at his residence, office or usual place of business), in the city (town *or* village) of and I received for answer: " "; The said bill is therefore noted for non-acceptance.

A. B.,
Notary Public.

(Date and Place.) 19

Due notice of the above was by me served upon {A. B., / C. D.,} the {drawer, / endorser,} personally, on the day of (*or*, at his residence, office or usual place of business in , on the day of (*or*, by depositing such notice, directed to him at in His Majesty's post office in the city, [town or village], on the day of , and prepaying the postage thereon.)

A. B., *Notary Public.*

(Date and Place.) 19

53 V., c. 33, form A.

FORM B.

PROTEST FOR NON-ACCEPTANCE OR FOR NON-PAYMENT OF A BILL PAYABLE GENERALLY.

(Copy of Bill and Endorsements.)

On this day of , in the year 19 , I, A. B., notary public for the province of , dwelling at , in the Province of , at the request of , did exhibit the original bill of exchange, whereof a true copy is above written, unto E. F., the {drawee / acceptor} thereof personally (*or* at his residence, office

or usual place of business) in and, speaking to himself (*or* his wife, his clerk, *or* his servant, &c.), did demand {acceptance / payment} thereof; unto which demand {he / she} answered: " "

Wherefore I, the said notary, at the request aforesaid, [have prot]ested, and by these presents do protest against the acceptor, drawer and endorsers (*or* drawer and endorsers) of the said bill, and other parties thereto or therein concerned, for all exchange, re-exchange, and all costs, damages and interest, present and to come, for want of {acceptance / payment} of the said bill.

All of which I attest by my signature.

(Protested in duplicate.)*

A. B.,

Notary Public.

53 V., c. 33, sch. form B.

FORM C.

PROTEST FOR NON-ACCEPTANCE OR FOR NON-PAYMENT OF A BILL PAYABLE AT A STATED PLACE.

(Copy of Bill and Endorsements.)

On this day of in the year 19 , I A. B., notary Public for the Province of dwelling at , in the province of , at the request of , did exhibit the original bill of exchange whereof a true copy is above written, unto E. F., the {drawee / acceptor} thereof, at , being the stated place where the said bill is payable, and there speaking to did demand {acceptance / payment} of the said bill; unto which demand he answered: " "

Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do protest against the acceptor, drawer and endorsers (*or* drawer and indor-

* See first note on p. 349.

sers) of the said bill and all other parties thereto or therein concerned, for all exchange, re-exchange, costs, damages and interest, present and to come for want of $\left\{\begin{matrix}\text{acceptance}\\ \text{payment}\end{matrix}\right\}$ of the said bill.

All of which I attest by my signature.

(Protested in duplicate.)*

A. B., *Notary Public.*

53 V., c. 33, sch. form C.

Form D.

PROTEST FOR NON-PAYMENT OF A BILL NOTED, BUT NOT PROTESTED FOR NON-ACCEPTANCE.

If the protest is made by the same notary who noted the bill, it should immediately follow the act of noting and memorandum of service thereof, and begin with the words "and afterwards on, &c.," *continuing as in the last preceding form, but introducing between the words* "did" *and* "exhibit" *the word* "again," *and in a parenthesis, between the words* "written" *and* "unto," *the words:* "and which bill was by me duly noted for non-acceptance on the day of "

But if the protest is not made by the same notary, then it should follow a copy of the original bill and endorsements and noting marked on the bill—and then in the protest introduce, in a parenthesis, between the words "written" *and* "unto," *the words:* "and which bill was on the day of , by , notary public for the Province of , noted for non-acceptance, as appears by his note thereof marked on the said bill."

53 V., c. 33, sch. form D.

Form E.

PROTEST FOR NON-PAYMENT OF A NOTE PAYABLE GENERALLY.

(Copy of Note and Endorsements.)

On this day of , in the year 19 , I A. B., notary public for province of , dwelling at , in the province of , at the request of , did exhibit the original

* See first note, p. 349.

promissory note, whereof a true copy is above written, unto, , the promisor, personally (*or*, at his residence, office *or* usual place of business), in , and speaking to himself (*or* his wife, his clerk *or* his servant, &c.), did demand payment thereof; unto which demand {he/she} answered: " "

Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do protest against the promisor and endorsers of the said note, and all other parties thereto or therein concerned, for all costs, damages and interest, present and to come, for want of payment of the said note.

All of which I attest by my signature.

(Protested in duplicate.)*

A. B., *Notary Public.*

53 V., c. 33, sch. form E.

Form F.

PROTEST FOR NON-PAYMENT OF A NOTE PAYABLE AT A STATED PLACE.

(Copy of Note and Endorsements.)

On this day of , in the year 19 , I A. B., notary public for the province of , dwelling at , in the province of , at the request of , did exhibit the original promissory note, whereof a true copy is above written, unto , the promisor, at , being the stated place where the said note is payable, and there, speaking to did demand payment of the said note, unto which demand he answered: " ."

Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do protest against the promisor and endorsers of the said note, and all other parties thereto or therein concerned, for all costs, damages and interest, present and to come, for want of payment of the said note.

All of which I attest by my signature.

(Protested in duplicate.)*

A. B., *Notary Public.*

53 V., c. 33, sch. Form F.

* See first note page 349.

FORM G.

NOTARIAL NOTICE OF A NOTING, OR OF A PROTEST FOR NON-ACCEPTANCE, OR OF A PROTEST FOR NON-PAYMENT OF A BILL.

(Place and Date of Noting or of Protest.)

1st.

To P. Q. *(the drawer.)*

at

Sir,

Your bill of exchange for $, dated at the day of , upon E. F., in favour of C. D., payable days after {sight / date} was this day, at the request of duly {noted / protested} by me for {non-acceptance / non-payment}

A. B.,

Notary Public.

(Place and Date of Noting or of Protest.)

2nd.

To C. D., *(endorser.)*

(*or* F. G.)

at

Sir,

Mr. P. Q.'s bill of exchange for $, dated at the day of , upon E. F., in your favour (or in favour of C. D.,) payable days after {sight, / date,} and by you indorsed, was this day at the request of duly {noted, / protested} by me for {non-acceptance / non-payment}

A. B.,

Notary Public.

53 V., c. 33, sch. Form G.

Form H.

NOTARIAL NOTICE OF PROTEST FOR NON-PAYMENT OF A NOTE.

(Place and Date of Protest.)

To

at

Sir,

Mr. P. Q.'s promissory note for $ dated at , the day of payable { days / months / on —— } after date to { you / E. F. } or order, and endorsed by you, was this day, at the request of , duly protested by me for non-payment.

A. B., *Notary Public.*

Form I.

NOTARIAL SERVICE OF NOTICE OF A PROTEST FOR NON-ACCEPTANCE OR NON-PAYMENT OF A BILL OR NOTE.

(to be subjoined to the Protest.)

And afterwards, I, the aforesaid protesting notary public, did serve due notice, in the form prescribed by law of the foregoing protest for { non-acceptance / non-payment } of the { bill / note } thereby protested upon { P. Q., / C. D., } the { drawer / endorsers } personally, on the day of (*or*, at his residence, office *or* usual place of business) in , on the day of ; (*or*, by depositing such notice, directed to the said { P. Q., / C. D., } at , in His Majesty's post office in on the day of , and prepaying the postage thereon.)

In testimony whereof, I have, on the last mentioned day and year, at aforesaid, signed these presents.

A. B.,
Notary Public.

53 V., c. 33, sch. Form I.

Form J.

PROTEST BY A JUSTICE OF THE PEACE (WHERE THERE IS NO NOTARY) FOR NON-ACCEPTANCE OF A BILL, OR NON-PAYMENT OF A BILL OR NOTE.

(Copy of Bill or Note and Endorsements.)

On this day of , in the year of 19 , I, N. O., one of His Majesty's justices of the peace for the district (*or* county, &c.), of , in the Province of , dwelling at (*or* near) the village of , in the said district, there being no practising notary public at or near the said village (*or any other legal cause*), did, at the request of and in the presence of well known unto me, exhibit the original { bill / note } whereof a true copy is above written unto P. Q., the { drawer / acceptor / promisor } thereof, personally, (*or* at his residence, office *or* usual place of business) in and speaking to himself (his wife, clerk *or* his servant, &c.), did demand { acceptance / payment } thereof, unto which demand { he / she } answered: " "

Wherefore I, the said justice of the peace, at the request aforesaid, have protested, and by these presents do protest against the { drawer and endorsers / promisor and endorsers / acceptor, drawer and endorsers } of the said { bill / note } and all other parties thereto and therein concerned, for all exchange, re-exchange, and all costs, damages and interest, present and to come, for want of { acceptance / payment } of the said { bill / note }

All which is by these presents attested by the signature of the said (*the witness*) and by my hand and seal.

(Protested in duplicate.)*

(Signature of the witness.)
(Signature and seal of the J. P.)

53 V., c. 33, sch. form J.

* See first note page 349.

APPENDIX.

NOTARIAL FEES.

Fees in Ontario.—Sub-section 2 of section 125, ante p. 348, provides that notaries may charge the fees in each province heretofore allowed them. By the Revised Statutes of Canada, 1886, chapter 123, section 25, it was provided that the fees to be taken by notaries public should be as follows and no more:—

For the protest of any bill, draft, note or order...$0.50
For every notice .... .25
For postage, the amount actually expended.

Fees in Quebec.—By Schedule B to chapter 123, R. S., 1886, the following fees were provided:—

For presenting and noting for non-acceptance any bill of exchange, and keeping the same on record $1.00
Copy of the same when required by the holder.....0.50
For noting and protesting for non-payment any bill of exchange, or promissory note, draft or order, and putting the same on record........ 1.00
For making and furnishing the holder of any bill or note with duplicate copy of any protest for non-acceptance or non-payment, with certificate of service and copy of notice served upon the drawer and indorsers 0.50
For every notice, including the service and recording copy of the same, to an indorser or drawer, in addition to the postage actually paid 0.50

Fees in Nova Scotia.—By chapter 123 R. S. Canada, 1886, section 7, it is provided that for the protest of bills and notes for $40 and upwards, drawn or made at any place in the province, upon, or in favor of any person or persons in the province, the fees may be charged as follows:—

For the protest $0.50
For each notice 0.25

Maclaren says* that for other than local bills and notes, the former charge of $2.50 for each protest, including notices, is still made, and that postage is in all cases additional.

Fees in New Brunswick.—Maclaren refers to the provincial statute of New Brunswick, now chapter 188 of the Consolidated Statutes, 1903, in which the tariff is given as follows:—

Presenting and noting of bill of exchange or promissory note for non-acceptance or non-payment	$0.50
Protest of note or bill of exchange when made, including presenting, noting and notice	1.00

He observes that, as the Parliament of Canada has exclusive legislative authority over the subject of bills of exchange and promissory notes, the validity of this provincial act is open to question, and adds that "it is said that the charge still usually made in that province is that in force before the act in question, viz:—

For protest and all notices	$3.00
Postage actually paid."	

Fees in Prince Edward Island.—Section 8 of chapter 123, R. S. Canada, 1886, provides the same fees as those already mentioned as provided by the statute for the Province of Nova Scotia. The terms in which the statute is drawn for both places are precisely the same. The fees taken in Prince Edward Island under the old tariff are given by Maclaren, J., at page 436 of his third edition, but he does not say whether they are now in force to any extent or not.

Fees in Manitoba.—Maclaren gives the charges in this province as appearing to be regulated by usage as follows:—

For protest	$1.00
For each notice	0.50
Postage in addition.	

* *Maclaren on Bills*, 3rd Ed., p. 435.

Fees in British Columbia.—Maclaren states the fees, as governed by usage, to be as follows:—

For postages and notices $2.00
Postage in addition.

Fees in Alberta and Saskatchewan.—The fees chargeable in the territories before the formation into provinces, are stated by Maclaren as governed by usage, as follows:—

For protest $2.00
For each notice 0.50
Postage in addition.

NOTES AND QUERIES.

Bill payable with bank interest.—It is stated at page 108 that this would be for an uncertain amount and therefore not a bill of exchange. It depends on the construction of the phrase. In the absence of any agreement the interest payable is the legal rate of five per cent. But would the document be so read? The parties did agree and meant what they said, that the acceptor or maker would pay the current rate which is uncertain and fluctuating. If it be said that the interpretation will be given which will make the instrument valid, a document in the form of a promissory note would be valid as an agreement between the parties although not a promissory note. A different question may present itself with respect to an acceptance of that which is not a bill of exchange. Perhaps an agreement might be made that it would be so read as to make the acceptance valid by holding the parties to the statutory rate of five per cent., which certainly was not what they meant to agree to. The words, "with interest," would have accomplished that result. When they said it was payable "with bank interest," they must have meant something different. On the whole, the writer adheres to the view stated in the text, but it may be an open question.

Renewal omitting an endorser. Does this discharge other endorsers?—A bank discounts a note with several endorsers and a renewal is presented with the name of one original endorser missing, the bank regarding it as of little financial value. The question is asked in the Bankers' Journal[1] whether this releases the other endorsers, and the answer given is that, unless the bank had knowledge of an agreement between the endorsers that all were to join in the renewal, the bank would be a holder in due course and entitled to recover.

Renewal of note does not impair defence of failure of consideration.—In "Bullion Mining Company v. Cartwright,"[2] Teetzel, J., said: "It was argued on behalf of

[1] 8 J. C. B., 77.
[2] 10 O. L. R., at 444.

the plaintiff that even if this view prevailed as to the original note", (that there had been a failure of consideration,) "the effect of the two renewals was to estop the defendant from the defence of want of consideration in the original note. I do not find that there was any circumstance in connection with either of the renewals which furnished further consideration to support the renewal. I take it to be well settled that if an original note is voidable for failure of consideration, no amount of renewing will cure the defect, unless some new consideration is introduced, and that a mere compliance with defendant's request to renew does not constitute such a consideration." Pollock, C. B., is cited by the learned judge as authority for the statement that "the fact of renewal does not import consideration." Of course, there may be consideration for the renewal that will supply the defect. If, for example, there were a dispute over the question and the renewal was clearly the result of a compromise, the case might come with in the principle laid down by Cockburn, C. J., in "Callischer v. Bischoffsheim."[8] The proposition is that the mere fact of renewal does not import consideration, and that it there was no consideration or a failure of consideration for the original note, that is a good defence to the renewal.

Blank indorsement. Holder making same special to himself may strike out name and substitute transferee as special indorsee.—The Standard Bank, holding a note indorsed in blank, stamped its own name over the blank indorsement converting it into a special indorsement to itself. Afterwards, desiring to transfer it among other securities to the Sovereign Bank, it struck out its own name as that of special endorsee and substituted the name of the Sovereign Bank, initialling the alteration. This it was held it could do. It was a "rough and ready" way of effecting the transfer, but was upheld by Falconbridge, C. J., and Britton, J., against the dissenting opinion of Street, J. Britton, J., said: "If the payee himself had made his indorsement special, instead of blank, his indorsee would not have the right to strike out such special indorsement, or if, after such special indorsement

[8] L. R. 5 Q. B., 449 (1870).

had been made by the Standard Bank, the payee had adopted it, and notified the bank that he would not consent to such indorsement being struck out, the case might have been different, but so long as the relations between the parties are in no way changed as between the payee and the holder, there is authority to the holder while he remains the holder to remove the words which he himself put on which do not affect the liability of the payee." "Sovereign Bank of Canada v. Gordon."[4]

Release of one or more on joint and several note releases all.—This was held "Bogart v. Robertson et al,"[5] where one of a number of makers of a joint and several note was absolutely released without the reservation of rights against the other makers and it was sought to recover against the others on the ground that it was intended that there should be a reservation of such rights. The release of one without such reservation released all. This is apparently opposed to the dictum of Cave, J., referred to on a previous page (449), to the effect that a joint and several note is the same as if two or more separate notes were given as well as the joint note. It is in accord with the dictum of Lord Denman, C. J., in "Nicholson v. Revill,"[6] but does not at first sight seem to be in line with the dictum of Parke, B., in "King v. Hoare,"[7] "the distinction between a joint and several contract is very clear. It is argued that each party to a joint contract is severally liable, and so he is in one sense, that if sued severally, and he does not plead in abatement, he is liable to pay the whole debt, but he is not severally liable in the same sense as he is on a joint and several bond, which instrument, though on one piece of parchment or paper, in effect comprises the joint bond of all and the several bonds of each of the obligors and gives different remedies to the obligee." In this case, however, the court was dealing with the case of a judgment against one of several joint debtors. In the Ontario case, the court is dealing with the case of a release, and the decision is put by Boyd, C., on the ground that any

[4] 9 O. L. R., 152 (1905). This case has been severely criticized by the *Canada Law Journal*. See vol. for 1906, p. 25.
[5] 8 O. L. R., 261 (1904).
[6] 4 Ad. & El., 675 (1836).
[7] 13 M. & W., 505 (1844).

one of the parties paying the joint, or joint and several debt, should have a right of contribution against the others. This he loses if that other has been released without the reservation of the obligee's rights against the co-debtors. The roundabout way in which this reservation works is explained by Parke, B., in "Kearsley v. Cole."[8] The consent of the party released to the reservation of the creditor's rights against the other party is an implied consent that such party shall have recourse against him.

Contribution among indorsers.—On a previous page (364), is a note of a case in the Privy Council in 1883, "Macdonald v. Whitfield," 8 App. Cases, 733, as to contribution between indorsers. An Ontario case is to the same general effect. The plaintiff and defendant were both accommodation indorsers of a promissory note. The plaintiff was the payee but when the instrument was given to him to indorse the defendant's name was already on the back of it, and the plaintiff indorsed under the defendant's indorsement. Each testified that his liability was to be secondary to that of the other, not that they so agreed with each other, but that the maker so agreed with each of them respectively. Held, that being sureties for the one debt, the rule of equitable contribution applied, and the plaintiff having paid the debt was entitled to recover only half of it from the defendant.[9]

Transfer after action brought on note.—On a previous page (221), this subject is discussed, and it is shown that the fact of a pending action on the note is no defence, but merely a ground for application to the court. In the New Brunswick case of "Kennedy Co. v. Vaughan,"[10] such an application was made and succeeded. An offer had been made and accepted in the pending action to suffer judgment by default, and the transferee had knowledge of the pending action.

Liability of pe on identifying payee.—The person who identifies the payee of a cheque or other document

[8] 16 M. & W. 135 (1840).
[9] *Steacy v. Stayner*, 7 O L. R., 684 (1904).
[10] 37 N. B., 112 (1905).

incurs no liability unless he does so falsely and with knowledge that his identification is false, or recklessly, with no genuine belief in the truth of identification which turns out to be untrue. The point is discussed in the Journal of the Canadian Bankers' Association,[11] where the case of "Derry v. Peek," in the House of Lords, is appositely cited.[12]

Banker crediting post-dated cheque to customer's account; is it holder for value?—In "Royal Bank of Scotland v. Tottenham,"[13] the question, among others, was as to value given for a post-dated cheque which the holder deposited to her credit at her own bank and against which she drew cheques. The drawer of the cheque gave notice to his banker to stop the cheque. Wills, J., held that directly the holder's bank had entered the cheque to her credit and communicated the fact to her, they acquired a good title to it, the fact that it was post-dated making it none the less negotiable. On appeal, Lord Esher, M. R., said: "When the bank received the cheque from Mrs. Monson they did so on an undertaking to give her credit to the amount of the cheque on her general account. This they did, and giving such credit is sufficient consideration as between a bank and a customer, consequently the bank were holders for value."

Can one be holder without indorsement of the payee?—The question is raised in the Canadian Bankers Journal.[14] The case is put of a bill drawn in favor of a bank which discounts the bill, stamping its indorsement thereon which it afterwards erases. Can the drawer sue the acceptor without the indorsement of the bank? The answer is that the bill should be indorsed by the bank back to the drawer "without recourse." According to the decision of Longley, J., in the "Nova Scotia Carriage Co. v. Lockhart,"[15] this is not apparently necessary. In that case a bill was drawn by the plaintiff on the defendant, payable to the order of the Union Bank of Halifax. "I think that the mere placing in the draft

[11] 3 J. C. B., 190.
[12] 14 App. Cas., 337 (1889).
[13] 1894, 2 Q. B., 715.
[14] 10 J. C. B., No. 4, p. 56.
[15] 1 Eastern L. R., 76.

the statement, 'pay to the order of the Union Bank of Halifax,' does not necessitate the indorsement by the Union Bank so far as the original parties are concerned, when it was handed over to the bank merely for collection. I think the drawers had a right to receive the bill from the bank as soon as it was dishonoured and thereby became the lawful holders and entitled to take action against the acceptors." No authority is given for this view and the decision has been both criticised and defended in the Canada Law Journal. It seems to run counter to the principle that none but the holder can sue on the bill. The holder is defined as the payee or the indorsee who is in possession of the bill, or the bearer. The transferee for value is entitled to have the payee's indorsement, but it has never been held, so far as this commentator is aware, except in this decision that he can get along in an action at law without it, nor can he go against the acceptor even in Equity, unless the Judicature system of procedure enables him to so. See "Edge v. Bumford," 31 L. J., 805.

The letter of the correspondent of the Canada Law Journal criticising the decision of Longley, J., will be found at page 683 of the Journal for 1906, and the editorial criticism at page 660 of the same volume. A letter defending the judgment will be found at page 752, and an editorial comment thereon at page 749 of the same volume. The apologist cites a case before Chief Justice Ritchie of New Brunswick, not named, where the suit was on a note which the plaintiff had retired from the hands of an endorsee, and the point was taken that the plaintiff's indorsement was still on the note shewing title out of him, and that he was not the legal holder. There was nothing in the point so taken and the case is nothing to the purpose. The note was doubtless transferable by delivery from the said indorsee and the plaintiff was, therefore, the lawful holder. How does that apply to the contention that plaintiff could not be a holder without the indorsement of the payee? He had in the case mentioned, the indorsement of the payee.* The fallacy in the decision of Longley, J., was in holding that the plaintiff could sue on the bill without the indorsement of the payee, and the dictum from Chalmers on Bills, at 142,

* C. L. J. 1906, p. 684.

cited by the first correspondent is entirely in point and seems to conclude the matter. He says, that subject to the rules as to transmission by act of law, "when a bill is payable to a particular person or persons, or to his or their order, an action thereon must be brought in the name of such person or persons."

Taking the body in execution.—It was intended to insert a note on this subject, but on second thought the discussion does not appear to be germane to the subject of this work. The discussion will be found in Chitty's Archbold's Queen's Bench Practice, 12th Ed., p. 708. The remedies are so different in the different provinces that a note on the subject that did not take into account the statutes of all the provinces would be misleading. In the province of Nova Scotia the statute expressly confers a right to seize property notwithstanding the debtor's discharge from imprisonment. R. S., vol. 2, cap. 183, sec. 25.

Cheque payable to insolvent deceased. Who should endorse?—The question is asked in Bankers' Journal[17] as to the case of a cheque payable to a payee personally, who assigns and afterwards dies; who should endorse? The answer is that if the cheque was for a debt due the estate, the money might safely be paid to the assignee. But on general principles, the executor or administrator should endorse.

Draft "enfaced" payable at a particular bank.—The question is asked in vol. 6 of the Journal of the Canadian Bankers Association, p. 209, as to the effect of a bill drawn in Sterling on London, England, from Dunedin, N. Z., and enfaced payable at the Bank of ——— San Francisco. The response is that if the "enfacing" means such a crossing as is commonly used in Canada it is in effect only a request that the San Francisco bank will negotiate the draft, which would not be considered an integral part of the instrument. That being the case, the bill is not payable at the office of the San Francisco bank and is not dishonoured if they will not comply with the request. "A draft drawn in Montreal on a bank in

[17] See 6 J. C. B., 384; 7 J. B., 163.

Toronto crossed with a request that some other bank will pay it in Hamilton is not, in our opinion, thereby made payable at the latter point. If the request is not complied with the only result that would follow so far as we can see, would be that the purchaser might have a claim for damages against the drawer for failure of an implied undertaking that the draft would be paid to him in Hamilton."*

"It is the custom in Canada to permit certain large financial institutions to place a memorandum on their cheque forms to the following effect: 'This cheque is negotiable' (or payable) 'at par at any office of the bank in Canada.' It has long since been settled that encashment of such a cheque by a branch of the bank other than that on which it is drawn is only a negotiation of it and we should suppose the 'enfacement' to which you refer to be of the same character."

"There are occasional cases here, where a cheque drawn by a customer is marked 'good' by the drawee bank and crossed by it with instructions to another branch of the bank to pay the same. This we should regard as a domiciliation by the acceptor of the cheque and it would probably be dishonoured if not paid in accordance with such instructions."

Endorsement with initials where payee's full name in bill.—A correspondent asks the editors of the Canadian Bankers' Journal[18] whether a bank would be justified in refusing to pay a cheque indorsed "J. Smith," where it was made payable to Joseph Smith. The answer is that, such an indorsement is as valid if made by the payee of the cheque as the full indorsement, "Joseph Smith," would be, and that the bank would not be justified in refusing to pay the cheque except under circumstances or for reasons which would cause them to refuse if the full name had been signed.

Endorser of note payable to bearer is liable.—The question is asked by a correspondent of the Canadian Bankers' Journal, and the response is that the liability of

* It is at least doubtful if such an action would lie. The drawer has made no undertaking.

[18] 6 J. C. B., 382.

an indorser on a note payable to bearer is precisely the same as on a note payable to order.[19]

Power of attorney to accept may be exercised after maturity.—The case is put in the Canadian Bankers' Journal of a power of attorney to a bank manager to accept. He does not accept but attaches the power of attorney to the draft. The customer has no rights against the drawee on the bill under these circumstances, because it has not been accepted, but the editors see no reason why the "Manager may not accept the bill after maturity under the power of attorney."[20]

Acceptance payable October 31st, that being last day of grace is not qualified.—The question is asked whether an acceptance so specifying would be a qualified acceptance of a bill drawn by its terms so as to become payable on October 31st. The doubt suggested is that if the acceptance were treated as part of the bill there would be three more days of grace, and it would not be payable till November 3rd, thus qualifying the terms of the bill by the acceptance. But the editors of the Bankers' Journal[21] do not so regard the matter. The acceptance is an agreement to pay the bill at its due date and is, therefore, not qualified.

Time for protest where bank not open on due date.—A question is raised in the Canadian Bankers' Journal[22] as to the time for protesting a bill where a bank has a branch open only on alternate days. What is to be done if the note falls due on the day the bank is closed? Can it be protested on the following day? The answer given is that "a bill is protestable only on the day of maturity." Section 119 is to this effect, ante p. 344. Noting, however, is sufficient, the protest being extended at the notary's leisure.

"No protest" slip, effect of.—The Journal of the Canadian Bankers' Association contains a valuable decis-

[19] 6 J. C. B., 314.
[20] 7 J. C. B., 158.
[21] 7 J. C. B., 161
[22] 10 J C B., No 4, p. 57.

ion by Mr. Lash, K. C., on a case submitted to him by the parties.[23] A slip containing the words, "no protest," was attached by the drawer to his draft which was drawn in Montreal on Vancouver. The draft was handed by the drawer's bank to another for collection and was dishonoured. The drawer never received notice of dishonour in consequence of the letter from Vancouver to the banker in Montreal having gone astray in the mails. When the drawer learned sometime afterwards of the dishonour he set up want of notice of dishonour and claimed that, whether strictly entitled to such notice or not, he was entitled to some timely notice of the dishonour of the draft. Mr. Lash decided that "the words, 'no protest,' signified more than an instruction that 'the formal instrument known as a protest, drawn up and signed, and sealed by a notary should be dispensed with. The words mean that the steps necessary to fix the liability of the drawer upon dishonour of the draft are dispensed with by him." The result was, in his judgment, that the drawers had incurred the ordinary liability upon the draft as drawer and had dispensed with notice of dishonour. As to the duty, notwithstanding the waiver of protest which he held to extend to all the proceedings usually necessary to fix the drawers, he cited two cases, one from Massachusetts and one from Maine, "Woodman v. Thurston,"[24] and "Emery v. Hobson,"[25] to the effect that there was no such duty. The drawer, having waived notice of dishonour, was not entitled to any notice or notification of any kind. "The drawer having dispensed with notice is liable on the bill without it, and if he wants to learn whether the bill has been paid or dishonoured he should make inquiries, and he cannot complain if, not having made inquiries, he finds that he has allowed an opportunity of collecting the bill to pass."

Request to return draft does not excuse presentment. The case is put of an acceptor requesting the collecting bank to return a draft to the drawer. This, it is said by the Journal, does not excuse the bank from duly presenting the bill on the day of maturity.*

[23] 6 J. C. B., 72
[24] 8 Cush. (Mass.), 157.
[25] 62 Maine, 578.
* 8 J. C. B., 291.

Two men of same name; payment to wrong person.—A question is asked in the Canadian Bankers' Journal as to the position of a banker who pays a cheque to the wrong man in good faith, there being two men of the same name. The answer is that the banker is liable and cannot charge the amount to the drawer. It is said to be the same case as the payment on a forged indorsement. See the case of "Mead v. Young,"[26] referred to at page 387.*

Post-dated cheque taken in place of acceptance of draft.—The banker having a draft for collection presents it to the drawee who gives him a post-dated cheque which he holds until maturity of the draft, which is not accepted. What happens if the cheque is dishonoured? The editing committee of the Journal of the Canadian Bankers' Association say that there is no recourse against the parties to the draft. The bank must do the best it can with the dishonoured cheque.[27]

Stamping sufficient without initials.—The subject of indorsement by means of a rubber stamp is referred to at page 233. A further question has been raised as to the effect of an indorsement by means of rubber stamp without any initials to verify the stamp. This is considered sufficient by the editors of the Canadian Bankers' Journal.[28] "The initials and folio are confirmatory of the stamped certification, and while desirable are not absolutely necessary."

Protest for better security on failure of acceptor.—The effect of this is discussed at page 343. The editors of the Bankers' Journal[29] say that the clause allowing such protest was, doubtless, inserted for the purpose of enabling the Canadian holder of a foreign bill to obtain any remedy in such cases which foreign laws give, e. g.: in France. There is nothing that the banker can do beyond protesting the bill, until it matures.

Current rate of exchange, 60 days rate.—A correspondent of the Canadian Bankers' Journal says that in

[26] 4 T. R., 28, (1790).
[27] 10 J. C B., No. 1, p 57.
[28] 10 J. C. B., No. 4, p. 57.
[29] 7 J. C. B., 161.
* 8 J. C. B., 288.

many instances demand letters of credit, drawn in Great Britain, payable at the "current rate of exchange," are redeemed in Canada at the sixty day rate, and asks whether the courts would sustain this practice. He points out that the practice arose when communication was much slower and less certain than in the present days of ocean greyhounds. The answer is given from the banker's standpoint and justifies the practice. The court, as the editors think, would have to find that the practice was well established and would place the meaning on the words which had been universally accepted for upwards of a century. As to the abstract fairness of the practice the editors seem to justify it as a reasonable charge on small amounts, and after discussing the matter pro and con, conclude "Our view briefly is that the phrase, 'Current rate of exchange,' means the 60 day rate; that this for Letters of Credit for moderate sums affords only a reasonable profit; that for larger amounts the charge is, under altered conditions, more than the service warrants, and that the difficulty is one to be met by reasonable concessions as has been done at Montreal and Toronto."[30] See also next following note.

English drafts and Canadian drafts drawn in £ s. d.—There is a further note in reference to the subject discussed in the foregoing note[31] to the effect that even where the English draft payable at current rate of exchange is a demand draft, the sixty-day rate should be understood. "If there seems to be a conflict because of the bill being payable on demand it will disappear if the bill is read in this way, 'On demand, pay to ———— pounds sterling, calculated at the sixty day rate of exchange.'"

If the bill is drawn without anything being said as to exchange, the method of computing is set out in section 163, p. 415.

As to a Canadian bill drawn payable in Canada in £ s. d., the editors remark that it is unusual and think the bank would have a right to refuse payment, but would probably be justified in regarding it as an order to pay the currency value of a similar amount of British

[30] 8 J. C. B., 211. See also 7 J. C. B., 287, 290, 299.
[31] 5 J. C. B., 331.

gold, i. e., to convert the sterling money at \$4.86⅔. In remitting to an English correspondent for such a cheque it would have to be treated as drawn for the amount in Canadian currency computed as above, and the exchange added accordingly.

Reasonable time for presenting cheque is a question for jury.—This subject is referred to on a previous page, 419, and an American case is cited showing that where the facts are not in dispute the question of reasonable time is one for the court. This is not English law. The case of "Wheeler v. Young," reported in the Journal of the Canadian Bankers' Association, vol. V, p. 125, shows that it is a question of fact for the jury, subject to review by the court only in the way that all findings of juries are subject to review.

Certification of cheque, effect of.—An important article on this subject appears in the Canadian Bankers' Journal,[33] taken from the American Law Register. The author, Leslie J. Tompkins, traces the history of the practice and says that the first instance of "marked cheques" in the English law appears in "Robson v. Bennett," decided in 1810.[34] In that case it was said to be "customary among bankers in London, in their dealings with each other not to pay any cheque which is presented by or on behalf of another banker after 4 p. m., but merely to give an answer to the person so presenting it, whether it is a good cheque or not, and in case the cheque is approved, a mark is made on it, either by the person presenting it or by the person who gives the answer. And a cheque so marked is considered entitled to a priority of payment on the next day." The court decided that the effect of marking the cheque was similar to the accepting of a bill, for the banker admits thereby assets and makes himself liable to pay. Mr. Campbell, in a note to this case in the Revised Reports, raises a question as to the effect of marking now, seeing that the statutes passed in 1821 and and 1856 embodied in the

[32] 13 *Times* L. R., 468.
[33] 9 J. C. B., 323.
[34] 2 *Taunton*, 388
[35] 11 R. R., at p. 616.

Bills of Exchange act (section 36), require that the acceptance of a bill of exchange should have the signature of the drawer. "But the effect of the custom may be to create by the marking an obligation upon the banker to appropriate the customer's assets in his hands to the cheque in priority to others." The question seems to be whether the banker who marks a cheque is making a contract or merely a representation. And it seems reasonable, and in accordance with this old authority to say that he is making a contract and not merely a representation that the drawer has money on deposit sufficient to meet the cheque. If the certification is an acceptance, it will not be an enforceable contract without the signature of the drawer. But with a certification signed it may be held that the certification is complete and binds the banker to honor the cheque. If so, of course it follows that a certification once given cannot be revoked. The banker who marks a cheque charges it up to the drawer and, if the funds were exhausted, would not honor a later cheque and would probably be justified in refusing to honor it. The consequence is that the drawer of the cheque cannot withdraw his money and the holder of the cheque does not withdraw it. Suppose that the banker becomes insolvent the next day, and before the cheque is presented for payment, it would be unjust that the drawer should have to pay the cheque to the holder. It has, therefore, been suggested that the holder, by taking a certified cheque instead of drawing the money when he has an opportunity has discharged the drawer, but a distinction has been suggested when the drawer obtains the certification. With reference to this distinction the editorial committee of the Bankers' Journal, say: "The true reason of the discharge of the drawer in one case, and not in the other appears to be this. When a cheque is given the drawer impliedly contracts with the payee that on due presentment it will be paid if the payee so desires. That implied contract embodies the whole right of the payee and the whole obligation of the drawer. The payee's right is to present the cheque and receive the money, nothing more and nothing less. When he presents the cheque and ascertains the preparedness of the bank to pay on the spot, he may if it pleases him, waive present payment, arranging with the bank to take

something else in its place. If he do so, the dealing is between him and the bank. The drawee is not concerned with its details. It is not the certification of the cheque that works the discharge of the drawee. It is the act of the payee who, having his opportunity to obtain payment, virtually instructs the bank to hold the money at his risk. The drawer is discharged by the complete fulfilment of his implied obligation to the payee. In the case of a cheque certified before delivery, the contract between drawer and payee upon the delivery if left to implication is the same as in the case of an uncertified cheque. The payee must still have his opportunity to duly present the cheque for payment and receive the amount. The anterior certification has not given him this opportunity. He who alone could present it for payment has not presented the cheque, nor has he elected to arrange with the bank for anything else than payment on presentment."

In a previous volume of the Bankers' Journal[36] a question had been raised as to the effect of certification. The case was put of a cheque dishonoured by the drawee bank and afterwards presented by a solicitor to the bank, when the banker said there had been a deposit made and offered payment. Instead of accepting payment the solicitor had the cheque certified, but on subsequent presentment for payment the banker cancelled the certification and refused payment explaining that the certification was a mistake and that the deposit on which he had been relying when he certified was a deposit to meet a previous overdraft. The editors say that there is no Canadian case on the subject and cite Daniel on Negotiable Instruments to the effect that the certification may be revoked, provided no change of circumstances has occurred which would render it inequitable for such a right to be exercised. They refer, however, to the law that the acceptance of a bill is complete upon delivery and that the ordinary mode in Canada of marking a cheque good is in effect an acceptance. "It is not clear, however," they say, "that the same results would not follow here as in the United States."

[36] 5 J. C. B., 456.

In "Gaden v. Newfoundland Savings Bank,"[37] Strong, C. J., delivering the judgment of the court, said that "the only effect of the certifying is to give the cheque additional currency by showing on the face that it is drawn in good faith on funds sufficient to meet its payment and by adding to the credit of the drawer that of the bank on which it was drawn." But the credit of the bank would not be added to the cheque if the certificate could be withdrawn, or if the bank was at liberty to pay the depositor's money out on account of other cheques than the one certified. In the case referred to the drawee bank had failed and the question was whether the holder of the cheque who had entered it to the credit of the drawer could come upon the drawer. It was contended that the certified cheque had been taken as cash and that the drawer could hold the bank in which she had deposited the cheque liable for the amount. This it was held she could not do. Consistently with the obligation of the drawee bank to pay the amount of the cheque, and even though it had made a contract with the holder to honour it, on presentation, it did not follow that the drawer could charge the amount to the receiving bank, the cheque having been presented within such delay as was permitted by the Newfoundland statute.

Cheque marked "good for two days only."—A note in the Canadian Bankers' Journal[38] in reply to a correspondent, distinguishes this from the acceptance of a cheque, the editors holding that after the two days have expired, the bank is not bound to pay the money unless there are funds; and the customer has a right to request the bank to cancel the debit entry made when the cheque was certified.

Countermand of cheque.—This subject is dealt with by section 167 of the act, page 419. A correspondent of the Canadian Bankers' Journal asks as to the effect of an notice to the bank by the holder of a cheque not to pay it because he has lost it. The editors reply that the countermand referred to in the section is clearly a counter-

[37] 1899, A. C., 281.
[38] 7 J. C. B., 299.

mand by the customer. "If the bank refuses payment on the notification of someone not the customer, and it should turn out that the person presenting the cheque was a holder in due course, the maker would have an action against the bank for refusing payment of his cheque, as the maker would be liable upon the cheque to a holder in due course. If the bank pays the cheque to a holder in due course, the original holder would have no action against the bank, as the cheque has as between him and the subsequent holder in due course ceased to be his property. If, however, the bank paid to a person who was not a holder in due course, under such circumstances as would disentitle it to say that the cheque was paid in good faith, then the original holder of the cheque could claim from the bank its value in an action of trover for conversion of the cheque.

"The receipt of such a notice from a person claiming to be the holder would undoubtedly put the bank upon inquiry as to the rights of the person presenting the cheque, and the bank should satisfy itself that he is really a holder in due course."

Discharge of demand note by renunciation. Delivery must be to maker or *semble* his legal representative.—A note on demand was made to a specified person without the words "order" or "bearer." The holder delivered it to a devisee, but without indorsing it. The court held that while the gift of the note to one of the devisees was strong evidence of the intention to forgive the debt, the note unfortunately was not indorsed by the payee, nor was there any consideration to support the agreement not to sue. There was, in fact, nothing except an intention not carried out, and such an incomplete transaction did not amount to a gift of the debt nor to any equitable release of it. "Edwards v. Walter," 4 J. C. B., 111.†

Post-dated acceptance of bill payable a month after sight.—The case is put in the Bankers' Journal[39] of a bill drawn payable one month after sight, presented for acceptance January 12th, and accepted, the acceptance

† 44 *Weekly Reporter*, 547.
[39] 3 J. C. B., 302.
* This note has already been referred to, though not so fully, at p. 132.

being dated January 16th. The question is asked, when does this become payable, and the answer given is that it is payable under the statute "according to the tenor of the acceptance," that is, one month from the 16th of January. But this being the case, the drawer and endorsers are discharged because the acceptance is qualified without their assent.

A bank's debtor presents a cheque for payment. Can bank retain it against the debt?—The question is asked in the Bankers' Journal whether in such a case the bank can apply the proceeds of the cheque to the payment of the debt due the bank by the person so presenting it. The editors of the Journal consulted the counsel of the Bankers Association, Mr. Lash, K.C., and under his advice framed the following reply:—

"The questions involve some nice considerations. There are two aspects in which the matter may be viewed: first, the strictly legal one; second, the ethical one. Upon the latter opinions of course may vary, and there is no rule for decision. We therefore refrain from expressing any opinion upon this branch, leaving each bank to decide for itself whether, under the particular circumstances which may surround the case, it would as a matter of ethics be justified in retaining the proceeds of the cheque.

"With reference to the legal aspect, there appear to be no reported decisions expressly governing the case. The answer to the question as to the payee's rights against the bank, may, we think, be worked out in principle upon these lines:

"Assume that the payee is the beneficial owner of a cheque. He presents it for payment. The bank accepts it in the usual way. This acceptance brings the payee into privity with the bank, and enables him to bring an action against the bank in his own name upon the cheque. If, therefore, instead of retaining the cheque and crediting the payee with the proceeds, the bank should hand back the accepted cheque to the payee and then refuse to pay it, the payee might bring an action against the bank for the amount. If he did so, what would be the bank's position? Clearly it could set off against such action the amount of the overdue note. If, however, the bank

retains the cheque and claims to apply the amount upon the overdue note, what would be the payee's remedy? We think he could proceed in three ways:

"(1) To sue in trover for the conversion of the cheque, or, speaking less technically, he could sue the bank for damages because he he had been deprived of his property, viz., the cheque. The amount of his damages in this case would be the value of the cheque, and would clearly be limited to the amount of the cheque. He could have no further claim.

"(2) If the bank had appropriated funds to the payment of the cheque—for instance, if the teller had counted out the money and and had told the payee that it was the money for the cheque—he could probably sue the bank to recover the amount as money held by the bank for his use.

"(3) He might possibly treat the possession of the cheque by the bank as his possession, and sue upon the acceptance.

"If he took the last course, then the bank would, as above stated, have the right to set off the amount of the overdue note. If he took the second course the bank would have the same right, the demands in each case being liquidated. But, if he took the first course, the right of the bank to plead set-off can only be exercised where the demand to which it is pleaded is a liquidated demand or one capable of being ascertained by computation as distinguished from a demand where the amount must be ascertained by assessment or valuation.

"But the bank's right would not in such a case be confined to pleading set-off. Under the practice of the Courts in Ontario, where a defendant is allowed in his defence to set up by way of counterclaim any demands against the plaintiff, the bank could in its defence to the action counterclaim for the amount of the overdue note. It would, of course, get judgment upon this counterclaim, and, even if the payee got judgment against the bank for the amount of the cheque as damages for its conversion, the practical result would be that the two judgments would be set off one against the other, and the only question involved would be one of costs.

"If the cheque, though payable to the order of the payee, really belonged to some other person, it is, we

think, clear that the bank would not have the rights above explained; it could not pay its own claim against the payee out of funds belonging to another.

"Our space for this number of the Journal will not allow us to deal with the other question, viz., whether the drawer would have any grounds for objecting, or legal remedy against the bank for so treating the cheque. We will allude to this branch of the question in our next issue, and explain also the rights of the payee against the drawer."*

In a subsequent issue, the editors further alluded to the subject as follows:—†

"The right of the drawer of a cheque having funds at his credit, is to have the bank pay his cheque on presentation, and should the bank refuse to do so without proper excuse, the drawer would have grounds for action against the bank, and would be entitled to recover substantial damages to be assessed by a jury, without proving actual damages as the result of the refusal to pay the cheque. If what took place between the bank and the payee of the cheque amounted to a refusal of payment, we think the drawer could complain and that the bank would be liable for damages for this refusal. Whether the bank refused or did not refuse to pay the cheque, would be a question of fact to be decided upon the circumstances.

"With reference to the position of the payee as against the drawer of the cheque, the decisions are reasonably clear. Prima facie the cheque is not given nor accepted as payment of a debt. It is a mere order on the bank to pay, and if not honored the debt remains, and the payee can sue the drawer for it. But there is of course nothing to prevent the drawer and the payee agreeing that the cheque should be taken as payment, and if it were so taken the debt would be discharged, and in such a case if the cheque should be dishonoured, the payee's remedy is upon the cheque only and not upon the debt. If the bank refused to pay the cheque and if there were no agreement that it was accepted in payment of the debt, then the payee could sue the drawer of the cheque for the debt.

*3 J. C. B., 111.
†3 J. C. B., 192.

"Such a state of facts could be imagined which would amount to payment of the cheque so far as the drawer is concerned, and which would entitle the bank to retain the money and set it off as against the debt owing to it by the payee; for instance, if the teller actually counted out the money and told the payee that it was the money for the cheque, and if the payee assented to this appropriation. But for practical purposes the inference which would no doubt be drawn by a court or jury in nine cases out of ten would be that the payee had not assented to the appropriation and that payment of the cheque had in effect been refused."

Firm name inaccurately given.—In a case referred to in the Bankers' Journal a firm properly named "A. Gagnon and W. Langlois," was written "Gagnon & Langlois," as makers of a note and the action was defended on this ground. The judgment was to the effect that both by English and French law it was not necessary that the exact firm name should be on the note to bind the firm if it was evident that the name written was intended to do so. The rule followed on the point was that given in Byles on Bills.[40] The firm is not liable when the signing partner varies the style of the firm unless there be some evidence of assent by the firm to the variation or *unless the names used though inaccurately yet substantially describe the firm.* "Le Banque Jacques Cartier v. Gagnon et al."[40]

Co-maker being surety not entitled to notice of dishonour.—The case is put by a correspondent in the Bankers' Journal of a party signing as a maker with another, but known to be only a surety for the other. Has he a right to notice of dishonour? The answer is that he has not. He has the ordinary rights of a surety, but not of an indorser, and his liability to pay the note continues without notice of dishonour because he is a promissor.[41]

Partial payment. Bank entitled to accept.—The editors of the Canadian Bankers' Journal, replying to a

[40] 2 J. C. B., 84.
[41] 8 J. C. B., 205.
[42] 6 J. C. B., 208.

question whether a bank to whom $100 was tendered on payment of a bill on which exchange was also due, were entitled to accept the partial payment, say that while the bank would have a right to refuse to accept anything short of the full amount, it is also justified in accepting on account the amount tendered and that this is the proper course to pursue in the interest of the owner of the draft.

A note to the same effect will be found in volume II.[43]

Cheque crossed "Duplicate."—The question is asked in the Bankers' Journal[44] as to a bank paying a cheque so marked, what would be its duty as regards the original. Is the drawer liable on the original? The answer is that the bank would not be liable to the customer if it refused to pay the original, but the drawer would be liable on the original to a holder in due course, hence, a duplicate should not be issued without proper indemnity, and is seldom issued without notice being given stopping payment of the original.

Duplicate draft paid; no defence to original.—The Canadian Bankers' Journal further answers the question as to the liability to pay the original draft where a duplicate has been presented and paid. The editors say that the original must nevertheless be paid in the hands of an innocent holder. The circumstances call for an indemnity before the duplicate is issued.

Forged and raised Cheques and Forged Indorsements.—These subjects have been fully dealt with in the text at pages 155 to 168, and at p. 399. An article appears on the subject in the Journal of the Canadian Bankers' Association which is too long to quote, and in which the cases are fully referred to.[45]

Raised cheque paid by mistake by bank that certified. Right to recover back money.—A customer of the Bank of Hamilton drew a cheque for five dollars against a deposit of $10.22. Opposite the $ mark where no

[43] 2 J. C. B., 390.
[44] 7 J. C. B., 292.
[45] 10 J. C. B., No. 4, p. 56.
[46] 10 J. C. B., No. 3, p. 52.

figures had been put he wrote 500 and in the blank space after the word "five" he wrote "hundred." The cheque was cashed by the Imperial Bank and presented in due course for payment to the Bank of Hamilton, where it was paid as a cheque for $500. The following day the mistake was discovered and the Bank of Hamilton demanded back the $495 overpaid. It was held by McMahon, J., that the plaintiff should recover, and this judgment was sustained by the Ontario Court of Appeal and the Supreme Court of Canada.[47] Strong, C. J., delivering the judgment of the court, distinguished the case of "Young v. Grote," referred to at page 12 and 212 (ante). In the present case the bank had paid the money on a mistake of fact and had a right to recover it on ascertaining the mistake, notwithstanding Armour, C. J.'s dissenting opinion, based on the delay in demanding the money. As to the contention that the Hamilton Bank had facilitated the fraud by certifying a cheque that could easily be raised, Strong, C. J., said that a man dealing with others was under no duty to take precautions to prevent loss to the latter by the criminal acts of a third person, and that the omission to do so was not negligence in law. As to the delay in demanding the money from the Imperial Bank, he said: "I deny that there is any abstract rule of law which requires that the money paid shall be demmanded on the day of the erroneous payment without regard to any question of prejudice to the holder. Each case must depend on the facts."

Stolen bank notes in hands of mala fide holder, or holder without consideration.—In "Richards v. The Bank of England,"[48] the plaintiff sued for £300, the value of three notes of £100 each, which were presented to the bank for payment and which the bank refused to cash. They had been stolen from the bank. The jury found that none of the notes had been fairly won, and that the third note had been obtained by means of the three card trick. Mr. Justice Phillimore said that he should have given judgment for the defendants anyhow, on the ground that there was no valuable consideration.

[47] 31 S. C. R., 344.
[48] 8 J. C. B., 393.

Lost bank note, remedy of holder.—The subject of lost bills is dealt with in the statute, see page 405, and a paragraph will be found on page 407 referring to a case with reference to the loss of a portion of a bank note. On further consideration the author would reconstruct the last sentence of the paragraph. There should always be an indemnity given in such a case. If the holder of one-half has a right to payment without indemnity, why may not the holder of the other half make the same claim? A note in the Canadian Bankers' Journal,[49] on this subject is to the following effect, in answer to the question what is the smallest portion of a Canadian bill that must remain to entitle the holder to its redemption at face value. "Theoretically, if a person without having any portion of a bank bill can prove conclusively that he is the owner of the bill, and that it has been destroyed, he is entitled to have it redeemed in full, on giving indemnity. There is, however, this serious practical difference in dealing with lost or destroyed bank notes, that, while indemnity can be given for an ordinary note because it can be easily identified, no indemnity is practicable for a lost bank note for the obvious reason that identification would be impossible. We think the principle followed by banks in redeeming mutilated notes is to pay them in full if satisfactory evidence of the destruction of the missing part is forthcoming. If not, and if the missing part is an important portion of the bill it is difficult to see what claim the holder has."

Lost deposit receipt.—With regard to a deposit receipt [50]the editors of the Banker's Journal explain that it is not a negotiable instrument and the loss of it would be no defence to the bank against an action for the amount. The holder could prove its contents by secondary evidence and recover. If, however, there were special terms in the receipt which he would have to comply with before claiming the deposit, these must be considered. "If the receipt contained the usual phrase, 'fifteen days notice of withdrawal to be given and this receipt to surrendered before payment is made,' it would certainly be a condition of the contract that the

[49] 10 J. C. B., No. 1, p. 53.
[50] 10 J. C. B., No. 1, p. 54.

receipt should be surrendered before payment can be demanded, and prima facie the bank would be justified in refusing payment until this condition can be performed; but we think the condition is one which would be held to have been discharged if the circumstances rendered it impossible of performance as a matter of fact, e. g., if the receipt had been burned or otherwise destroyed."

Cheque lost in mail by bank, other than drawee. Rights and recourses.—The question is asked in the Canadian Bankers' Journal as to the rights and remedies of a bank which has taken from a customer and credited to him or his agent, a cheque on some other bank, which it has remitted for collection from the drawee bank, the cheque having been lost in the mails and the drawer refusing to give a duplicate unless indemnified. The answer is that the bank cannot charge the customer with the lost cheque unless it has an understanding with him that although it has credited the amount to him (i. e., has cashed or negotiated the cheque), it was acting as his agent in collecting. In the absence of a special contract the bank has only the remedy which it would have against any indorser; it must procure a duplicate from the drawer, present it and if dishonoured give the the customer due notice. Possibly if a " copy " is presented under section 120 and the drawee bank replies "no funds" and the cheque is protested, the bank would have an immediate right of action against the endorser and could charge the amount to his account. The bank as holder is the only party who can obtain a duplicate and must give security (section 156.) The customer is not concerned until the bank has established its right to charge him as above described. An endorser on a lost cheque who comes between the drawer and the customer may be made to endorse a duplicate (on suitable indemnity being given) or he may be sued and under section 157 cannot set up the loss of the cheque if indemnified.[51]

Naming place of payment, a material alteration.—This was held in " Macintosh v. Haydon,"[52] on the ground

[51] 8 J. C. B., 208.
[52] Ry. & Moo., 362 (1826).

that it might affect the right of the indorsee. "Suppose the indorsee who was cognizant of such an alteration were to pass the bill while current to another person, without communicating the fact, and he to a third. The right of the last indorsee to sue his immediate indorser would, as the bill appears, be complete upon default made at the bankers" (where the bill was made payable by the alteration) "and notice thereof; whereas in truth, the acceptor not having in reality undertaken to pay there, would have committed no default by such non-payment."

Adding name is a material alteration.—A note was issued as the joint and several note of W. C. and James Beatty, the latter being in fact a surety as the plaintiff well knew. When the note was overdue in the plaintiff's hands John Albert Beatty added his name, without the knowledge or assent of James Beatty. The evidence showed that John Albert did not sign as an indorser, and in fact he had not signed it otherwise than as maker. The case was in this way distinguished from the case of "Ex parte Yates,"[53] in which the party signing signed as an indorser, although on the face of the note. Not having signed otherwise than as maker, John Albert Beatty had not incurred the liabilities of an indorser under section 131. And his signing as maker was held a material alteration which avoided the note.[54]

The ruling in this case, although accepted by the editors of the Canadian Bankers' Journal, is criticised on the ground that the addition of a name should no more vitiate the note than the insertion of the words, "or demand," in a note in which no time is mentioned.[55] The reason for the latter ruling is that a note with no time mentioned is payable on demand. But the effect of the note is changed if a new party is added. If the holder were suing on the note he would have to join all the makers or run the risk of a plea in abatement. This would be enough in itself to make the alteration a material one. In the particular case of the new maker being only a surety, the maker's rights against the one already on the note might in some contingencies be different because of

[53] 2 DeG. & J., 191.
[54] *Carrique v. Beaty*, 24 O. A. R. 302 (1897).
[55] 5 J. C. B., 249.

his dealings with the added party. However, this may be, the point, as the editors concede, is well settled.

Alteration of date of demand note fatal.—In "Boulton v. Langmuir,"[56] it was decided that it was a material alteration to change the date of a note payable on demand, notwithstanding the effect was to benefit the maker by reducing the interest payable. Osler, J., said: "I do not see that the fact of its being thereby made in one respect more favorable to the defendants affects the question of the materiality of the alteration. It is the change in the contract, not the surrounding circumstances, which the law regards."

Alteration by inserting the words "jointly and severally" is material. Note void although alteration cancelled.—This was held in "Banque Provincale v. Arnoldi,"[57] in which the words, "jointly and severally," were inserted before the words "promise to pay." The materiality of the alteration lay in the fact that it changed a joint to a joint and several obligation. The case also decided that, although the manager of the bank who had innocently inserted the words intending to procure the assent of all the parties, afterwards drew his pen through them, the makers of the note knowing nothing of the alteration until after it was so cancelled, the note was void.

Alteration not ratified by subsequent authority to do similar acts.—In "Sutton v. Blakey,"[58] an acceptance had been signed by the defendant, Mrs. Blakey. Her son, after it was so accepted, changed "three months" to "twelve months," the period originally intended by the parties. On the following day and before the money advanced on the bill was paid over, the son obtained authority from his mother to use her name for drawing and accepting promissory notes and bills of exchange for all business purposes, &c., &c. Mr. Justice Lawrence held that the authority given to the son after the acceptance did not authorize him to make the alteration so as to bind her. In other words, the subsequent authoriza-

[56] 24 Ont. A. R., at 627.
[57] 2 Ont. L. R., 624.
[58] 13 *Times* L. R., 441.

tion to accept bills was not a ratification of his unauthorized act in altering the acceptance. 4 J. C. B., 419.

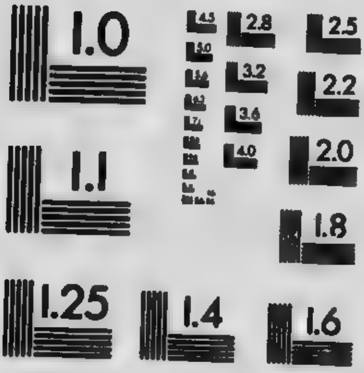
British Columbia. Imperial Stamp Act never in force, or if so annulled by Bills of Exchange Act.—A local manager of an incorporated company having a limited authority to indorse cheques for deposit with the Bank of British Columbia, indorsed and cashed at the Bank of Montreal, cheques payable to the company drawn on the bank. It was contended that section 19 of the English Stamp act of 1853, which exonerates bankers from liability if they pay on what purports to be an authorized indorsement made good the title of the Bank of Montreal to the cheques. It was held, however, by Hunter, J., that if this act had ever been in force in British Columbia it was annulled by the repugnant legislation of the Bills of Exchange act, and that the Bank of Montreal was liable to the company for amount of the cheques so cashed.*

* Hinton Electric Co. v. Bank of Montreal, 9 B. C., 545 (1903).

INDEX

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



APPLIED IMAGE Inc
1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
(716) 288 - 5989 - Fax

ertain

ansferee

rse, 112